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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 620

HARRIEL L. FOWLER, PETITIONER

vs.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1956

Certiorari granted December 10, 1956

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO......

FREDERICK H. WILKINSON, WARDEN
UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

Appellant,

vs.

HARRIEL L. FOWLER

Appellee.

NO. 5385
CIVIL ACTION

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JAMES W. DORSEY, United States Attorney, Atlanta, Georgia.

HARVEY H. TYSINGER, Assistant United States Attorney, Atlanta, Georgia.

C. F. CORDES, Colonel, JAGC, Third Army, Fort McPherson, Georgia.

JOHN A. SMITH, JR., Captain, JAGC, Third Army, Fort McPherson, Georgia.

Attorneys for Appellant.

HENLEY, EPSTEIN, OWENS, CHANCEY & BRAGG; LEON S. EPSTEIN, 1630 Fulton National Bank Bldg., Atlanta 3, Georgia.

Attorneys for Appellee.

INDEX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PETITION FOR WRIT OF HABEAS CORPUS

No. 5385
Civil Action

The petition of HARRIEL L. FOWLER, hereinafter referred to as petitioner, against W. H. HARDWICK, Warden, UNITED STATES PENITENTIARY, respectfully shows to the court the following facts to wit:

1.

That the petitioner is being restrained of his liberty by the respondent who is the warden of the United States Penitentiary located in Atlanta, Georgia.

2.

That said detention is taking place within the jurisdiction of this court.

3.

That said petitioner is being deprived of his liberty under the authority of the United States of America in violation of his Constitutional rights as enumerated in Amendments V and VI of the United States Constitution.

4.

The petitioner shows that he was tried at Hoengsong, Korea on June 8, 1951 by General Court Martial for the

violation of the 92nd. Article of War and the 96th. Article of War.

5.

Specification One of the Charges was:

1: "In that Corporal HARRIEL L. FOWLER, Hdqrs., Hdqrs. & Service Co., 72nd. Tank Battalion, APO 248, did, at Chundong-ni, South Korea, on or about 16 March, 1951, with malice of aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or a carbine."

Specification Two of the Charges was:

2: "In that HARRIEL L. FOWLER, Hdqrs., Hdqrs. & Service Company 72nd. Tank Battalion, APO 248, did, at Chundong-ni, South Korea on or about the 16th March, 1951, forcefully and feloniously, against her will have carnal knowledge of an adult Korean female person whose name is unknown."

6.

That the petitioner pleaded not guilty to both specifications of charges and was tried on both charges simultaneously together with two co-defendants.

7.

That the evidence which was presented to the court against the petitioner was so vague, indefinite, and without proof that a conviction based thereon was ridiculous.

8.

That the petitioner would never have been convicted

had the court not been so prejudiced by the evidence presented against the other defendants which evidence, according to the record, should not have been considered against your petitioner.

9.

That the record of the trial which will be introduced in evidence shows upon its face the complete unfairness and the gross prejudice of the trial court in conducting the trial against your petitioner. Said record in its entirety shows such prejudice that any conviction based thereon would be violation of the petitioner's constitutional rights as enumerated in Amendments V and VI of the United States Constitution.

10.

On January 9th, 1951 the above General Court Martial found the petitioner guilty of murder and of attempted rape in violation of the 92nd. Article of War and the 96th. Article of War.

11.

During the Court Martial, the Law Officer instructed the court with respect to the penalty it could impose on the murder charge, but said nothing as to the penalty that might be imposed for attempted rape. At that time the penalties were, for murder, death or life imprisonment as a court-martial might direct, and for attempted rape, such punishment as a court-martial might direct, subject to a maximum of 20 years' imprisonment. Table of Maximum Punishments, Section A., Manual for Courts-Martial, United States, 1951.

12.

The court-martial, after deliberating, sentenced the petitioner to life imprisonment.

13.

It should be noted that on May 31st, 1951, the Articles of War were superceded by the Uniform Code of Military Justice, 50 U. S. C. A., Section 551 et seq., so that the substantive offenses with which plaintiff was charged were governed by the Articles but that the procedures for review of his sentence were those established by the Uniform Code.

14.

On July 3, 1951, the Commanding General of the Second Military Division, the convening authority, approved the action of the court-martial and forwarded the record to the Judge Advocate General of the Army for review by a Board of Review in his office. On January 15, 1952, the Board of Review handed down its decision. It disapproved the murder conviction for lack of evidence, but approved the attempted rape conviction and decided that 20 years' imprisonment was the appropriate punishment therefor.

On June 2, 1952, the United States Court of Military Appeals declined to consider petitioner's petition for Grant of Review U. S. vs. FOWLER, DECOSTER, ET AL, 1, U. S. C. M. A. 713. In due course your petitioner was transferred to the Penitentiary in Atlanta, Georgia where he is now confined.

16.

The petitioner shows that he is wrongfully restrained of his liberty because under all the evidence as shown by

the record of the court-martial, the petitioner was not given a fair trial under Amendments V and VI of the United States Constitution.

17.

The petitioner shows that he is wrongfully restrained of his liberty because the Board of Review was not vested with any authority to give the petitioner a 20 year sentence and same is a void commitment under which the petitioner may not legally be held.

18.

Petitioner further states that he is a citizen of the United States and is without funds to prosecute his petition for Habeas Corpus and desires from the Court permission to proceed in *forma pauperis*.

19.

Petitioner further states that he is completely innocent of the crimes charged to him by the courts-martial and of which he was wrongfully convicted.

Wherefore, your petitioner prays that a rule nisi issue requiring the respondent to show cause why said Writ of Habeas Corpus should not be issued, and prays that the respondent be ordered to release the petitioner from further custody, and further prays that he be allowed to proceed in *forma pauperis*.

This 21st day of October, 1955.

Henley, Epstein, Owens, Chancey & Bragg
Leon S. Epstein
By: /s/ Leon S. Epstein

1630 Fulton National Bank Building

Atlanta, Georgia
CY. 5929.

AFFIDAVIT

GEORGIA, FULTON COUNTY.

Personally appeared before the undersigned attesting officer duly authorized by law to administer oaths, HARRIEL L. FOWLER, who states under oath that he is the petitioner in the foregoing suit and the facts stated therein are true to the best of his knowledge and belief.

/s/ Harriel L. Fowler
HARRIEL L. FOWLER

Sworn to and subscribed before me
this 18th day of October, 1955.

/s/ D. B. Laughlin
Notary Public
Parole Officer. Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U. S. C. 4004)

Filed October 26, 1955
Pauper's affidavit and Rule Nisi omitted.

(TITLE OMITTED)

RESPONSE

Comes now the respondent, W. H. Hardwick, Warden, United States Penitentiary, Atlanta, Georgia, upon whom has been served an order to show cause why a writ of *habeas corpus* should not issue for the production of Harriel L. Fowler in custody as a prisoner by authority of the United States, pursuant to the sentence of a general court-martial under the following circumstances.

I.

The petitioner was lawfully enlisted in the Army of the United States in the grade of private on March 11, 1946, and remained a member of the Army of the United States until lawfully discharged, on or subsequent to June 30, 1952, pursuant to the sentence of a general court-martial (Exhibit A).

II.

On May 21, 1951, the petitioner was served with charges which alleged that on or about March 16, 1951, at Chu-dong-ni, South Korea, the said Harriel L. Fowler did, in violation of Article of War 92 (formerly 10 U. S. C. 1564), murder an adult Korean female person whose name is unknown (Exhibit B).

III.

On May 21, 1951, the petitioner was served with charges which alleged that on or about March 16, 1951, at Chu-dong-ni, South Korea, the said Harriel L. Fowler did, in violation of Article of War 92, *supra*, rape an adult Korean female person whose name is unknown (Exhibit B).

IV

On June 8, 1951 and June 9, 1951 the said petitioner was duly arraigned and tried for these offenses before a general court-martial convened by paragraph 14, Special Orders Number 148, Headquarters, 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated June 1, 1951 (Exhibit B).

V

On June 9, 1951, the said Harriel L. Fowler was convicted of murder in violation of Article of War 92, *supra*,

and attempted rape, in violation of Article of War 96 (formerly 10 U. S. C. 1568) by the said general court-martial, and sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life (Exhibit B).

VI

Under the provisions of the Uniform Code of Military Justice, Article 61 (50 U. S. C. 648), the convening authority referred the record of petitioner's trial to his staff judge advocate for review and the said staff judge advocate, after a review of the said record of trial, submitted his written opinion thereon to the convening authority in which he found that the sentence imposed upon the petitioner was correct in law and fact, and recommended that the sentence be approved.

VII

On July 3, 1951, the sentence adjudged by the general court-martial was approved by the convening authority. The results of the petitioner's trial and the initial action of the convening authority were promulgated by General Court-Martial Orders Number 44, Headquarters 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated July 3, 1951 (Exhibit B).

VIII

Pursuant to the Uniform Code of Military Justice, Article 66, (50 U. S. C. 653), a Board of Review in the Office of The Judge Advocate General of the Army reviewed the record of trial and on January 15, 1952, approved only so much of the findings of guilty as found

the petitioner guilty of attempted rape in violation of Article of War 96, *supra*, and only so much of the sentence as included dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for twenty years. The said Board of Review held that the findings and sentence, as thus approved, were correct in law and fact, and affirmed the findings and sentence as thus modified (CM 347258, Fowler, et al, 2 CMR 336).

IX

Pursuant to the provisions of the Uniform Code of Military Justice, Article 67 (*b*) (3) and (c) (50 U. S. C. 654), the petitioner, through counsel, on or about April 29, 1952, filed a petition for grant of review and brief in support thereof in the United States Court of Military Appeals. On June 2, 1952, an order was issued by the said United States Court of Military Appeals denying the said petition (United States v. Fowler, et al, 1 USCMA 713, 3 CMR 151).

X

The provisions of the Uniform Code of Military Justice, Article 71 (c) (50 U. S. C. 658) having been complied with, General Court-Martial Order Number 705 was promulgated on June 30, 1952, by the Commanding Officer, Camp Cooke, California, where petitioner was then held in confinement. This order directed execution of the sentence to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for twenty years, and directed that petitioner be committed to the custody of the Attorney

General or his designated representative for classification, treatment, and service of the sentence to confinement (Exhibit A).

XI

By order of the Secretary of the Army on June 17, 1954, so much of the sentence to confinement as was in excess of eighteen years was remitted (Exhibit C).

XII

The respondent lawfully holds the said Harriel L. Fowler in custody under the authority and by virtue of the facts hereinbefore stated (Exhibit D).

XIII

Answering the allegations in the application of the petitioner for a writ of habeas corpus, filed with this Court October 26, 1955, the respondent admits, denies, and alleges as follows:

1. Respondent admits the allegations in paragraphs 1 and 2 of the petition.

2. Respondent denies the allegations in paragraph 3 of the petition.

3. Respondent admits the allegations in paragraph 4 of the petition with reference to Article of War 92 only, and alleges that petitioner was tried for two offenses in violation of that article and found guilty of one offense in violation of said article and of the lesser included offense of attempt to rape, in violation of the 96th Article of War.

4. Respondent admits that the charges under which the petitioner was arraigned, as shown in paragraph 5 of the petition, are substantially correct, but refers to Exhibit B of this return as shown the verbatim language of each of the specifications.

5. Respondent admits the allegations in paragraph 6 of the petition.

6. Respondent denies the allegations in paragraphs 7, 8 and 9 of the petition.

7. Respondent admits the allegations in paragraph 10 of the petition, except that the correct date of the findings of guilty is June 9, 1951, not January 9, 1951.

8. Respondent admits the allegations of paragraph 11 of the petition as to maximum punishment, but alleges further that such maximum punishment was also controlled by the provisions of paragraph 117 *c*, Manual for Courts-Martial, United States Army, 1949.

9. Respondent admits the allegations in paragraph 12 of the petition, but alleges further that the sentence included dishonorable discharge and forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

10. Respondent admits the allegations of paragraph 13 of the petition.

11. Respondent admits the allegations of paragraph 14 of the petition, except that portion of the paragraph referring to the decision as to sentence, such portion being

denied as incomplete and misleading. The decision of the Board of Review is correctly stated in Paragraph VIII of this return, *supra*.

12. Respondent admits the allegation of paragraph 15 of the petition.

13. The respondent denies the allegations of paragraph 16 and 17 of the petition.

14. The respondent is unable to admit or deny the allegations of paragraph 18 of the petition.

15. Respondent denies the allegations of paragraph 19 of the petition.

XIV

For further answer, the respondent avers:

1. The general court-martial by which the petitioner was convicted had jurisdiction over the person of the petitioner; the offense of which the petitioner was convicted was an offense over which the general court-martial had jurisdiction; and the said general court-martial, having been legally constituted, and the sentence being within the maximum authorized for the offense of which the petitioner was found guilty, as modified and affirmed by the board of review, acted within the scope of its lawful powers.

2. All sentences imposed by courts-martial under military law are entire and single. The sentence imposed by the court-martial upon the petitioner embraced the offense of attempted rape, which offense is included in the offense of rape charged, since a sentence of a court-martial is a sentence imposed for all of the offenses for which an ac-

cused person has been convicted. Such imposition of an entire and single sentence for all offenses for which an accused person may have been convicted is not a new procedure under the Uniform Code of Military Justice, the same procedure being for application under the old Articles of War (formerly 10 U. S. C. 1471-1593).

3. The law officer was under no duty, and was not requested, to instruct the court-martial with regard to the maximum punishment which could be imposed for attempted rape. No erroneous instruction was given.

4. The instruction of the law officer as to sentence was given only after the full and proper presentencing procedure required by Appendix 8 a, pages 520 and 521, *Manual for Courts-Martial, United States,* 1951, had been completed.

5. The sentence imposed upon the petitioner, having been imposed for all of the offenses for which the petitioner had been convicted, was divisible, and the board of review acted within its lawful powers in upholding the portion thereof which it approved (Uniform Code of Military Justice, Art. 66 (c)., *supra*).

6. The appropriateness of a sentence which is within the maximum authorized sentence is not within the scope of review by civil courts on *habeas corpus.*

7. The Uniform Code of Military Justice (50 U. S. C. 551-736) provides an appellate process within the military establishment to review the proceedings of courts-martial, to ferret out irregularities in the trial and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's Armed Forces.

The trial and appellate action on petitioner's case were in conformity with the said Uniform Code of Military Justice, and the *Manual for Courts-Martial, United States,* 1951 (16 Fed. Reg. 1303-1469).

8. The fairness of a trial by court-martial conducted in conformity with the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States,* 1951, and the legal sufficiency of the evidence are not within the scope of review by civil courts on *habeas corpus.*

WHEREFORE, the respondent respectfully prays this court that the order to show cause be discharged, the petition for writ of *habeas corpus* be dismissed, and the said Harriel L. Fowler remain in the custody of respondent.

/s/ James W. Dorsey
JAMES W. DORSEY
United States Attorney

/s/ Harvey H. Tysinger
HARVEY H. TYSINGER
Assistant United States Attorney

/s/ Clifford F. Cordes, Jr.
CLIFFORD F. CORDES, JR.
Colonel, J. A. G. C.

/s/ John A. Smith, Jr.
JOHN A. SMITH, JR.
Captain, J. A. G. C.
Counsel for Respondent.

Filed November 7, 1955.

72975

HEADQUARTERS
Camp Cooke, California

GENERAL COURT-MARTIAL 30 June 1952
ORDER NUMBER 705

In the general court-martial case of Corporal Harriel L. Fowler, RA 34 872 429, United States Army, Headquarters, Headquarters and Service Company, 72d Tank Battalion (presently confined Branch United States Disciplinary Barracks, Camp Cooke, California), the proceedings of which were promulgated in General Court-Martial Orders Number 44, Headquarters, 2d Infantry Division, APO 248, dated 3 July 1951, the findings of guilty of Specification 1 of the Charge and the Charge have been set aside. *The finding of guilty of Specification 2 of the Charge and the finding of guilty of violation of the 96th Article of War, and only so much of the sentence* as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard *labor for twenty years have been affirmed* pursuant to the Uniform Code of Military Justice, Article 66. The provisions of the Uniform Code of Military Justice, Article 71*c*, having been complied with, the sentence as thus modified will be duly executed. The forfeitures shall apply to all pay and allowances becoming due after the date of this order. A United States penitentiary, reformatory, or other such institution is designated as the place of confinement, the prisoner to be committed to the custody of the Attorney General or his designated representative for classification, treatment, and service of the sentence to confinement. (CM 347258).

BY ORDER OF COLONEL KIRBY:

OFFICIAL:

/s/ Frank L. Hopson
FRANK L. HOPSON
WOJG USA
Asst Adjutant General

WELDON B. WELLS
Lt. Col, GS
Actg Chief of Staff

DISTRIBUTION:

Y (Par 59 SR 310-110-1)

EXHIBIT A

HEADQUARTERS
2d Infantry Division
APO 248 c/o Postmaster
San Francisco, California

#72975-A

GENERAL COURT-MARTIAL ORDERS NUMBER 44

3 July 1951

Before a general court-marial which convened at Hoengsong, Korea, pursuant to paragraph 14, Special Orders No. 148, Headquarters, 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated 1 June 1951, was arraigned and tried:

Corporal Harriel L. Fowler, RA 34872429, U. S. Army, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248.

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Corporal Harriel L. Fowler, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, with malice afore-

thought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or carbine.

Specification 2: In that Corporal Harriel L. Fowler, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, forcibly and feloniously, against her will, have carnal knowledge of an adult Korean female whose name is unknown.

PLEAS

To all Charges and Specifications: Not Guilty.

FINDINGS

Of Specification 1. Guilty.

Of Specification 2, Guilty, except the word "have," substituting therefor the words, "attempt to have"; of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge as to Specification 1, Guilty; as to Specification 2, Not Guilty, but guilty of a violation of Article of War 96.

SENTENCE

To be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. (No previous convictions considered.)

The sentence was adjudged on 9 June 1951.

ACTION

HEADQUARTERS
2d Infantry Division
APO 248 c/o Postmaster
San Francisco, California

3 July 1951

In the foregoing case of Corporal Harriel L. Fowler, RA 34872429, Headquarters, Headquarters and Service Company, 72d Tank Battalion, 2d Infantry Division, APO 248, the sentence is approved. The application of the forfeitures is deferred until the sentence is ordered into execution.

The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, accused will be transferred to Central Command, APO 503, for confinement in the United States Army Stockade, 8044th Army Unit, APO 503.

/s/ Clark L. Ruffner
/t/ CLARK L. RUFFNER
Major General, U. S. Army
Commanding

BY COMMAND OF MAJOR GENERAL RUFFNER:

RUPERT D. GRAVES
Colonel, GS
Chief of Staff

OFFICIAL:
/s/ John H. Wood
JOHN H. WOOD
WOJG, USA
Asst AG

EXHIBIT B

DEPARTMENT OF THE ARMY
Office of the Adjutant General
Washington, D. C.

(EMBLEM) In reply refer to
AGPK-CB 201 Fowler, Harriel L.
(9 Jun 54)

17 June 1954

RECEIVED
RECORD OFFICE
Jun 18, 1954
U. S. PENITENTIARY,
ATLANTA, GA.

In the case of Prisoner Harriel L. Fowler, RA 34 872 429, confined at United States Penitentiary, Atlanta, Georgia, so much of the sentence to confinement as initially promulgated in General Court-Martial Order No. 44, Headquarters, 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated 3 July 1951, and as ordered into execution in General Court-Martial Order No. 705, Headquarters, Camp Cooke, California, dated 30 June 1952, as is in excess of eighteen years, is remitted.

BY ORDER OF THE SECRETARY OF THE ARMY:

(Name illegible)
Adjutant General

EXHIBIT C

Record Form No. 1
Rev. Jan. 1, 1952

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

SENTENCE DATA RECORD

U. S. Penitentiary, Atlanta, Ga.
INSTITUTION

6-21-54: Corrected ARMY REMISSION
DATE

M I L I T A R Y

INST. NAME Harriel L. Fowler TRUE NAME Harriel Lee Fowler NO. 72975

ALIAS RACE White BIRTHDATE 8-26-24

RESIDENCE Dorsey, Mississippi AGE 26

DATE	DISTRICT	SENTENCE			OFFENSE
6-9-51	ARMY-Korea	20 Years	FINE None / COSTS	COM. PD.	Assault to Rape.
		GCMO NO. 44	FINE / COSTS	COM. PD.	
		ASN RA 34 872 429	FINE / COSTS	COM. PD.	
			FINE / COSTS	COM. PD.	

TOTAL SENTENCE 18 years.

SENTENCE BEGINS	June 9, 1951			
As HO-L COMMITTED TO FED. INST.	Oct. 20, 1952 Nov. 8, 1952			
ELIGIBLE FOR PAROLE	June 8, 1957	June 8, 1957		
RATE PER MONTH GOOD TIME	10 Days	10 Days		
TOTAL GOOD TIME POSSIBLE	2160 Days	2160 Days		
EXPIRES WITH GOOD TIME	July 10, 1963	July 10, 1963		
EGT - 33 Days EXP. WITH (EXTRA) (PART) G. T.	June 7, 1963	June 7, 1963		
EXPIRES FULL TERM	June 8, 1969	June 8, 1969	MD	

(TITLE OMITTED)

PETITIONER'S TRAVERSE TO RESPONSE

Comes now the petitioner and files this his traverse to the respondent's response and shows:

1.

Petitioner admits all of Paragraph 1 excepting the words "lawfully discharged" which he contends he was not.

2.

Petitioner admits Paragraphs 2, 3, 4, 5, 6, 7, 9 and 11.

3.

Petitioner denies as alleged in the response Paragraphs 8, 10, and 12.

4.

Petitioner does not answer Paragraph 13 of the response because it is traverse to allegation in the original petition.

5.

Petitioner states Paragraph 14 is merely an argument of law which has no application in the case because all of said contentions were dealt with and disapproved in the findings of the United States Court of Appeals in the case of Carl Andrew DeCoster vs. P. J. Madigan 223 Federal 2nd., Page 906.

WHEREFORE, the petitioner prays that his writ of Habeas Corpus do issue and it be ordered that he be released from custody.

This 18 day of November, 1955.

HENLEY, EPSTEIN, OWENS, CHANCEY & BRAGG
Leon S. Epstein
Attorneys for Petitioner
By: /s/ Leon S. Epstein
1630 Fulton National Bank Bldg.
Atlanta 3, Georgia
CY. 5929
Acknowledgment of service omitted.
Filed Nov. 18, 1955

(TITLE OMITTED)

ORDER TO RELEASE PRISONER UPON PAYMENT OF FIVE THOUSAND DOLLARS BOND TO ANSWER THE FINAL JUDGMENT IN THIS CASE

As this case involves the same facts referred to in the case of *De Coster* vs. *Madigan,* decided by the Seventh Circuit Court of Appeals, *22 F. 2d, 906,* they will not be here repeated.

After hearing able arguments from both sides and a study of the authorities this Court feels compelled to agree with the majority opinion in the case above cited and to order release of the prisoner. However, the Court will require a bond of Five Thousand ($5,000.00) Dollars to answer to the final judgment in this case upon appeal.

This Court has read with a great deal of interest the comprehensive and thoughtful minority opinion in the above stated case, also the equally well-considered opinion by Judge Frederick V. Follmer, United States

District Judge for the Middle District of Pennsylvania, in the case of *Chester E. Jackson* vs. *George W. Humphrey, Warden, Habeas Corpus No. 282.* Both opinions express in clear and forceful language reasons why this applicant should be detained in custody. Under the record of the military court it appears he should be punished, but it is not for this Court on habeas corpus to fix his punishment. The military court gave him a life sentence. Had they given him twenty years for assault with intent to rape that sentence would now be good, the murder conviction being set aside. This Court cannot assume that had he not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years. It is therefore ordered that the prisoner be released upon posting bond in the sum of Five Thousand ($5,000.00) Dollars, to be approved by the Clerk of this Court, to answer the final judgment in this case.

This the 27th day of December, 1955.

/s/ Frank A. Hooper
FRANK A. HOOPER
United States District Judge

Filed December 27, 1955

(TITLE OMITTED)

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE FIFTH CIRCUIT

Notice is hereby given, with the authority of the Attorney General of the United States, that the Warden, United States Penitentiary, Atlanta, Georgia (formerly

W. H. Hardwick, deceased, now T. J. Gough, Acting Warden), respondent above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment ordering release of petitioner upon payment of $5,000 bond pending final judgment upon appeal entered in this action on December 27, 1955.

This 19th day of January, 1956.

/s/ James W. Dorsey
JAMES W. DORSEY
United States Attorney

/s/ Harvey H. Tysinger
HARVEY H. TYSINGER
Assistant United States Attorney

/s/ C. F. Cordes
C. F. CORDES
Colonel, J. A. G. C.

/s/ John A. Smith, Jr.
JOHN A. SMITH, JR.
Captain, J. A. G. C.
Counsel for Respondent

Filed Jan. 19, 1956

(TITLE OMITTED)

ORDER SUBSTITUTING NAME OF WARDEN

The foregoing agreed statement having been read and considered, the same is approved.

IT IS HEREBY ORDERED that the name of FREDERICK H. WILKINSON, WARDEN, be substituted and used in lieu of any other names that appear in the pleadings as Warden.

This 17th day of February, 1956.

/s/ Frank A. Hooper
FRANK A. HOOPER
United States District Judge

Filed Feb. 17, 1956

AGREED STATEMENT OF APPEAL

I

STATEMENT OF AGREEMENT

Come now the respondent-appellant herein, Warden, United States Penitentiary, Atlanta, Georgia (formerly W. H. Hardwick, deceased; now T. J. Gough, Acting Warden), and Harriel L. Fowler, petitioner-appellee, pursuant to Rule 76 of the Federal Rules of Civil Procedure, and agree on the statement herewith following (Part II below) as the record on appeal.

II

STATEMENT OF ESSENTIAL FACTS AND PROCEEDINGS

The appellee, who was then a corporal in the United States Army, was convicted, in a common trial with two other soldiers, by a properly constituted general court-martial in Korea on June 9, 1951, of premeditated murder, in violation of Article of War 92 (formerly 10 U. S. C. 1564), and of attempted rape, in violation of Article of War 96 (formerly 10 U. S. C. 1568). The alleged offenses were committed on an adult Korean female.

The findings of guilty as announced by the court with respect to appellee were as follows:

> "PRES: Corporal Harriel L. Fowler, it is my duty as president of this court to inform you that the court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote

was taken concurring in each finding of guilty, finds you:

Of Specification 1, guilty.

Of Specification 2, guilty, except the word "have," substituting therefor the words, "attempt to have;" of the excepted word, not guilty, of the substituted words, guilty.

Of the charge as to specification 1, guilty; as to Specification 2, not guilty, but guilty of a violation of Article of War 96" (Record of trial, at p. 53).

Specification 1 alleged the offense of premeditated murder. Specification 2, as modified by the above findings, alleged the offense of attempted rape.

After the court's findings as to both offenses were announced, the law officer gave the court the following instruction:

"LO: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949, page 296, 'Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct.' The court will be closed" (Record of trial, at p. 56).

Thereafter, on the same date, the court sentenced the appellee as follows:

"PRES: Corporal Fowler it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring, sentences you to be dishonor-

SENTENCE BEGINS	June 9, 1951				
As HO-L COMMITTED TO FED. INST.	Oct. 20, 1952 Nov. 8, 1952				
ELIGIBLE FOR PAROLE	June 8, 1957	June 8, 1957			
RATE PER MONTH GOOD TIME	10 Days	10 Days			
TOTAL GOOD TIME POSSIBLE	2160 Days	2160 Days			
EXPIRES WITH GOOD TIME	July 10, 1963	July 10, 1963			
EGT - 33 Days EXP. WITH (EXTRA) (PART) G. T.	June 7, 1963	June 7, 1963			
EXPIRES FULL TERM	June 8, 1969	June 8, 1969 MD			
FULL TERM LESS 180 DAYS	Dec. 10, 1968	Dec. 10, 1968			
SENTENCE CHANGED	xxxxxxxxx	June 17, 1954			
BASIS FOR CHANGE	xxxxxxxxx	Army Clemency			
NEW TERM	xxxxxxxxx	18 Years			

GOOD TIME FORFEITED

DATE	AMOUNT
4-8-53	60 SGT (SUSPENDED)

GOOD TIME WITHHELD

DATE	AMOUNT	DATE	AMOUNT

GOOD TIME RESTORED

DATE	AMOUNT	DATE	AMOUNT

ACTIONS: U. S. BOARD OF PAROLE

DATE	NO APPL.	FORTH.	EFFECTIVE	RELEASED	DEN.	CONT.	C. R.	WARRANT	REVOKED	DISCH'GED

RELEASES AND RECOMMITMENTS OTHER THAN PAROLE AND C.R.

DATE	METHOD

EXHIBIT D

ably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of your natural life" (Record of trial, at p. 56).

The convening authority of the general court-martial, the Commanding General of the 2d Infantry Division, approved the sentence on July 3, 1951.

Pursuant to Article 66, Uniform Code of Military Justice (50 U. S. C. 653), the record of trial was reviewed by a board of review in the office of The Judge Advocate General of the Army. On January 15, 1952, the board of review, having determined that the conviction for murder was not supported by the evidence, held and took action as follows (CM 347258, Fowler, et al, 2 CMR 345, 346):

> "By reason of the foregoing conclusions and the action herein taken as to the murder specification, the sentences of confinement at labor for life are improper. Under the vicious circumstances of this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape.
>
> "*Action by the Board*
>
> "For the reasons stated, the board of review finds as to each accused: that the approved findings of guilty of Specification 1 of the Charge and the Charge [premeditated murder] are incorrect in law and fact and the same are set aside; that the approved finding of guilty of Specification 2 of the Charge and the approved finding of guilty of a violation of the 96th Article of War [attempted rape] are cor-

rect in law and fact; and that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact. The board of review having determined upon the basis of the entire record that the approved findings of guilty, except as thus set aside, and the approved sentence, as modified, should be approved as to each accused, such findings, except as thus set aside, and sentences, as modified, are

Affirmed." (Portion in brackets supplied.)

A petition for grant of review by the United States Court of Military Appeals was denied by that court on June 2, 1952 (3 CMR 151, 1 USCMA 713).

General Court-Martial Order No. 705, directing execution of the sentence, was published at Headquarters Camp Cooke, California, on June 30, 1952.

The appellee was placed in custody of the appellant, Warden, United States Penitentiary, for the purpose of execution of the sentence to confinement.

By order of the Secretary of the Army on June 17, 1954, so much of the sentence to confinement at hard labor as was in excess of eighteen years was remitted.

On October 26, 1955, the appellee filed a petition for habeas corpus in *forma pauperis* in the United States District Court, Northern District of Georgia, Atlanta Division, alleging, among other things, the following:

"17.

"The petitioner shows that he is wrongfully re-

strained of his liberty because the Board of Review was not vested with any authority to give the petitioner a 20 year sentence and same is a void commitment under which the petitioner may not legally be held."

Rule *nisi* issued, and a return and traverse to the return were filed.

Prior to the time the above quoted petition was filed, the above stated allegation had not been suggested or raised by the appellee or counsel in any proceedings before any tribunal.

A hearing was held before the Honorable Frank A. Hooper, Judge in the District Court of the United States for the Northern District of Georgia, Atlanta Division, on December 19, 1955. At said hearing, as to the above quoted allegation, the appellee, by counsel, relied on the majority opinion in *DeCoster* v. *Madigan*, 223 F. 2d 906 (7th Cir., 1955). *Carl Andrew DeCoster*, the appellant in the cited cases, was tried in common trial by the same court-martial as appellee in this case, and the decision of the district court judge denying release was reversed on an issue substantially identical to that made by the appellee here in the above quoted paragraph 17 of his petition for habeas corpus. The appellant herein relied on the minority opinion of the cited case, and on the unreported decision of Judge Follmer, United States District Judge for the Middle District of Pennsylvania, in the case of *Chester C. Jackson* v. *George W. Humphrey*, Warden, Habeas Corpus No. 282 (135 Fed. Supp. 776), denying release to Jackson, who was the third soldier tried in common with appellee in this case.

Thereafter, in the United States District Court for the

Northern District of Georgia, Atlanta Division, the following judgment issued in this case:

(TITLE OMITTED)

"ORDER TO RELEASE PRISONER UPON PAYMENT OF FIVE THOUSAND DOLLARS BOND TO ANSWER THE FINAL JUDGMENT IN THIS CASE

"As this case involves the same facts referred to in the case of *DeCoster* vs. *Madigan*, decided by the Seventh Circuit Court of Appeals, 223 F. 2d, 906, they will not be here repeated.

"After hearing able arguments from both sides and a study of the authorities this Court feels compelled to agree with the majority opinion in the case above cited and to order release of the prisoner. However, the Court will require a bond of Five Thousand ($5,000.00) Dollars to answer to the final judgment in this case upon appeal.

"This Court has read with a great deal of interest the comprehensive and thoughtful minority opinion in the above stated case, also the equally well-considered opinion by Judge Frederick V. Follmer, United States District Judge for the Middle District of Pensylvania, in the case of *Chester E. Jackson* vs. *George W. Humphrey, Warden, Habeas Corpus No.* 282. Both opinions express in clear and forceful language reasons why this applicant should be detained in custody. Under the record of the military court it appears he should be punished, but it is not for this Court on habeas corpus to fix his punishment. The military court gave him a life sentence. Had they given him twenty years for assault with intent to rape that sentence would now be good, the murder conviction being set aside. This Court cannot assume that he had not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years. It is therefore ordered that the prisoner be released upon posting bond in the

sum of Five Thousand ($5,000.00) Dollars, to be approved by the Clerk of this Court, to answer the final judgment to this case.

"This the 27th day of December, 1955.

"Frank A. Hooper
United States District Judge."

On January 19, 1956, respondent below filed the following notice of appeal:

(TITLE OMITTED)

"NOTICE OF APPEAL TO COURT OF APPEALS FOR THE FIFTH CIRCUIT"

"Notice is hereby given, with the authority of the Attorney General of the United States, that the Warden, United States Penitentiary, Atlanta, Georgia (formerly W. H. Hardwick, deceased, now T. J. Gough, Acting Warden), respondent above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment ordering release of petitioner upon payment of $5,000 bond pending final judgment upon appeal entered in this action on December 27, 1955.

"This 19th day of January, 1956."

It is further stipulated and agreed that the record of trial by court-martial and allied papers, introduced in evidence at the hearing on December 19, 1955, as "Respondent's Exhibit No. 1," said record being a properly authenticated photostatic copy from the files of the Department of the Army, is too voluminous and would be impossible to reproduce without inconvenience and additional expense to the government, and that such record be designated and forwarded to the Court of Appeals for the Fifth Circuit as a physical exhibit, for such inspection as the members of the Court of Appeals for the Fifth Circuit may desire to make, under the provisions of Rule 75 (i) of the Federal Rules of Civil Procedure.

III

STATEMENT OF POINTS RELIED UPON BY APPELLANT ON APPEAL

The appellant will rely on the following points on appeal:

(1) The district court erred in considering, and was without jurisdiction to review, on *habeas corpus*, a sentence authorized by, and imposed in accordance with, the Uniform Code of Military Justice.

(2) The district court erred in determining that, upon conviction of a soldier by a court-martial for murder and attempted rape, a sentence to life imprisonment does not necessarily include an appropriate sentence for attempted rape.

(3) The district court erred in determining that a sentence to twenty years imprisonment for attempted rape was illegally affirmed by a board of review when, following conviction of a soldier by a court-martial for murder and attempted rape and sentence to dishonorable discharge, total forfeitures, and life imprisonment, the board of review set aside the conviction for murder and found that only the conviction for attempted rape was correct in law and fact.

This the 17th day of February, 1956.

/s/ James W. Dorsey
JAMES W. DORSEY,
United States Attorney

/s/ Harvey H. Tysinger
HARVEY H. TYSINGER,
Assistant United States Attorney

/s/ C. F. Cordes
C. F. CORDES,
Colonel, JAGC

/s/ John A. Smith, Jr.
JOHN A. SMITH, JR.,
Captain, JAGC
Counsel for Respondent-
Appellant

/s/ Harriel L. Fowler
HARRIEL L. FOWLER,
Appellee
HENLEY, EPSTEIN, OWENS,
CHANCEY & BRAGG
LEON S. EPSTEIN,
Attorneys for Petitioner-
Appellee
By /s/ Leon S. Epstein

Filed Feb. 17, 1956

ORDER DESIGNATING AGREED STATEMENT AND PHYSICAL EXHIBIT ON APPEAL

The foregoing agreed statement having been read and considered the same is approved.

IT IS ORDERED that the same be certified to the Court of Appeals for the Fifth Circuit as the record on appeal in the above stated case, under the provisions of Rule 76 of the Federal Rules of Civil Procedure, together with the Petition, Response, Traverse and Order To Release Prisoner Upon Payment of Five Thousand Dollars Bond to Answer the Final Judgment in This Case.

IT IS FURTHER ORDERED that Respondent's Exhibit No. 1 be designated as a physical exhibit and that same be forwarded with the record on appeal, in lieu of printing said exhibit and incorporating it as a part of the printed record, under the provisions of Rule 75 (i) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Respondent's Exhibit No. 1 be returned to the Clerk of the United States District Court for the Northern District of Georgia with the mandate from the Court of Appeals for the Fifth Circuit.

This 17th day of February, 1956.

/s/ Frank A. Hooper
FRANK A. HOOPER
United States District Judge

Filed Feb. 17, 1956

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA }
} SS:
NORTHERN DISTRICT OF GEORGIA }

I, F. L. Beers, Clerk of the United States District Court in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 32 pages contain a true, full, complete and correct copy of the original record and all proceedings (except respondent's exhibit #1) in the matter of

HARRIEL L. FOWLER
Petitioner

vs.

F. H. WILKINSON, Warden
United States Penitentiary
Atlanta, Georgia
Respondent

Civil Action 5385

as specified in the designation of contents of record herein and as the same remains of record and on file in the Clerk's Office of the said District Court at Atlanta, Georgia.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court at Atlanta, Georgia, this 24th day of February, A.D., 1956.

F. L. BEERS
Clerk, United States District Court
Northern District of Georgia
By /s/ J. L. Moore
J. L. MOORE
Deputy Clerk

(SEAL)

39 In the United States Court of Appeals for the Fifth Circuit

Minute entry of Argument and Submission—May 23, 1956

[Omitted in printing.]

* * * * * *

40 In the United States Court of Appeals for the Fifth Circuit

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No. 15967

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HARRIEL L. FOWLER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[File endorsement omitted.]

Before RIVES, CAMERON and BROWN, *Circuit Judges.*

Opinion—(June 27, 1956).

PER CURIAM: The appellee and two other soldiers, DeCoster and Jackson, were convicted by a general courtmartial in Korea, of premeditated murder, in violation of Article of War 92 (formerly 10 U. S. C. 1564), and of attempted rape, in violation of Article of War 96 (formerly 10 U. S. C. 1568) both offenses having allegedly been committed on an adult Korean female at Chudong-ni, South Korea, on March 16, 1951.

41 On writ of habeas corpus, DeCoster, apparently the most guilty one of the three, has since been discharged by the Seventh Circuit, Judge Finnegan dissenting. *DeCoster* v. *Madigan*, 7th Cir., 223 F. 2d. 906. On the other hand, Jackson's petition for habeas corpus was later denied by the district court, *Jackson* v. *Humphrey*, M. D. Pa., 135 F. Supp. 776, and

its judgment was affirmed by the Third Circuit on May 31, 1956, *Jackson* v. *Taylor*, No. 11,808, 3d Cir., m/s. The present petition was considered by the district court after the decision of the Seventh Circuit and before that of the Third, and the district court followed the majority opinion of the Seventh Circuit. The facts and the law have been so adequately discussed in the cases previously reported, that we refrain from stating our reasoning further than to say that, after a careful study of the record and briefs and consideration of the oral argument, we are in full accord with the dissenting opinion of Circuit Judge Finnegan in *DeCoster* v. *Madigan*, *supra*, the opinion of District Judge Follmer in *Jackson* v. *Humphrey*, *supra*, and the opinion of Circuit Judge Hastie in *Jackson* v. *Taylor*, *supra*.

The judgment is, therefore, reversed and judgment here rendered denying the petition for writ of habeas corpus.

REVERSED AND RENDERED.

42 In United States Court of Appeals for the Fifth Circuit

No. 15967.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

HARRIEL L. FOWLER

Minute entry of Judgment—June 27, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be; and the same is hereby, reversed and judgment here rendered denying the petition for writ of habeas corpus.

* * * * * *

43 [Clerk's Certificate to foregoing transcript omitted in printing.]

* * * * * *

No. 285 Misc. —, October Term, 1956

[Title omitted.]

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Order allowing certiorari—December 10, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to the gross sentence question. The case is transferred to the appellate docket as No. 620 and placed on the summary calendar and assigned for argument immediately following No. 234 Misc.

Question Presented

Where, under the particular circumstances here involved, a soldier who has been convicted by a general court-martial of premeditated murder and attempted rape and has received a sentence of life imprisonment on the conviction for the premeditated murder and an Army Board of Review later reverses the conviction on the murder charge, whether the action of the Army Board of Review, in deciding upon a sentence of twenty years imprisonment for the remaining charge of attempted rape, constitutes an original imposition of sentence which is beyond the power and authority of the Board of Review as said sentence was never considered by the trial court.

Statement of the Case

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit reversing the district court's grant of a writ of habeas corpus challenging the validity of a twenty-year sentence of imprisonment imposed upon him by an Army Board of Review for a crime of attempt to commit rape. The background and essential facts of this case are contained in the following agreed statement (R. 26) as submitted to the Court of Appeals for the Fifth Circuit and respondent's Exhibit 1 which is the complete court-martial proceedings.

Come now the respondent-appellant herein, Warden, United States Penitentiary, Atlanta, Georgia (formerly W. H. Hardwick, deceased; now T. J. Gough, Acting Warden), and Harriel L. Fowler, petitioner-appellee, pursuant to Rule 76 of the Federal Rules of Civil Procedure, and agree on the statement herewith following as the record on appeal.

The appellee, who was then a corporal in the United States Army, was convicted, in a common trial with two

other soldiers, by a properly constituted general court-martial in Korea on June 9, 1951, of premeditated murder, in violation of Article of War 92 (formerly 10 U.S.C. 1564), and of attempted rape, in violation of Article of War 96 (formerly 10 U.S.C. 1568). The alleged offenses were committed on an adult Korean female.

The findings of guilty as announced by the court with respect to appellee were as follows:

> "PRES: Corporal Harriel L. Fowler, it is my duty as president of this court to inform you that the court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:
>
> Of Specification 1, guilty.
>
> Of Specification 2, guilty, except the word "have," substituting therefor the words, "attempted to have;" of the excepted word, not guilty, of the substituted words, guilty.
>
> Of the charge as to specification 1, guilty; as to Specification 2, not guilty, but guilty of a violation of Article of War 96" (Record of trial, at p. 53).

Specification 1 alleged the offense of premeditated murder. Specification 2, as modified by the above findings, alleged the offense of attempted rape.

After the court's findings as to both offenses were announced, the law officer gave the court the following instruction:

> "LO: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949, page 296, 'Any person subject to Military

law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct.' The court will be closed" (Record of trial, at p. 56).

Thereafter, on the same date, the court sentenced the appellee as follows:

"PRES: Corporal Fowler, it is my duty as president of this court to inform you that the court in closed session and upon secret ballot, three-fourth of the members present at the time the vote was taken concurring, sentences you to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of your natural life" (Record of trial, at p. 56).

The convening authority of the general court-martial, the Commanding General of the 2d Infantry Division, approved the sentence on July 3, 1951.

Pursuant to Article 66, Uniform Code of Military Justice (50 U.S.C. 653), the record of trial was reviewed by a board of review in the office of The Judge Advocate General of the Army. On January 15, 1952, the board of review, having determined that the conviction for murder was not supported by the evidence, held and took action as follows (CM 347258, Fowler, et al. 2 CMR 345, 346):

"By reason of the foregoing conclusions and the action herein taken as to the murder specification, the sentences of confinement at labor for life are improper. Under the vicious circumstances of this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape.

"*Action by the Board*

"For the reasons stated, the board of review finds as to each accused: that the approved findings of guilty of Specification 1 of the Charge and the Charge (premeditated murder) are incorrect in law and fact and the same are set aside; that the approved finding of guilty of Specification 2 of the Charge and the approved finding of guilty of a violation of the 96th Article of War (attempted rape) are correct in law and fact; and that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact. The board of review having determined upon the basis of the entire record that the approved findings of guilty, except as thus set aside, and the approved sentence, as modified, should be approved as to each accused, such findings, except as thus set aside, and sentences, as modified, are

Affirmed." (Portion in brackets supplied.)

A petition for grant of review by the United States Court of Military Appeals was denied by that court on June 2, 1952 (3 CMR 151, 1 USCMA 713).

General Court-Martial Order No. 705, directing execution of the sentence, was published at Headquarters Camp Cooke, California, on June 30, 1952.

The appellee was placed in custody of the appellant, Warden, United States Penitentiary, for the purpose of execution of the sentence to confinement.

By order of the Secretary of the Army on June 17, 1954, so much of the sentence to confinement at hard labor as was in excess of eighteen years was remitted.

On October 26, 1955, the appellee filed a petition for habeas corpus in *forma pauperis* (R. 1) in the United States

District Court, Northern District of Georgia, Atlanta Division, alleging, among other things, the following:

"17.

"The petitioner shows that he is wrongfully restrained of his liberty because the Board of Review was not vested with any authority to give the petitioner a 20 year sentence and same is a void commitment under which the petitioner may not legally be held."

Rule *nisi* issued, and a return (R. 6) and traverse (R. 21) to the return were filed.

Prior to the time the above quoted petition was filed, the above stated allegation had not been suggested or raised by the appellee or counsel in any proceedings before any tribunal.

A hearing was held before the Honorable Frank A. Hooper, Judge in the District Court of the United States for the Northern District of Georgia, Atlanta Division, on December 19, 1955. At said hearing, as to the above quoted allegation, the appellee, by counsel, relied on the majority opinion in *DeCoster* v. *Madigan,* 223 F. 2d 906 (7th Cir., 1955). Carl Andrew DeCoster, the appellant in the cited cases, was tried in common trial by the same court-martial as appellee in this case, and the decision of the district court judge denying release was reversed on an issue substantially identical to that made by the appellee here in the above quoted paragraph 17 of his petition for habeas corpus. The appellant herein relied on the minority opinion of the cited case, and on the unreported decision of Judge Follmer, United States District Judge for the Middle District of Pennsylvania, in the case of *Chester C. Jackson* v. *George W., Humphrey, Warden,* Habeas Corpus No. 282 (135 Fed. Supp. 776), denying release to Jackson, who was

the third soldier tried in common with appellee in this case."

The United States District Court for the Northern District of Georgia, on December 27, 1955, in an unreported decision, issued a judgment (R. 32) granting the writ of habeas corpus and ordered the petitioner released.

On January 19, 1956, respondent filed a notice of appeal (R. 34) to the United States Court of Appeals for the Fifth Circuit. On June 27, 1956, the Court of Appeals, in a per curiam decision (R. 39), reversed the district court, 234 F. 2d 615. On September 25, 1956, the petitioner filed a petition for writ of certiorari with this Court. On December 10, 1956, this Court granted certiorari limited to the gross sentence question (R. 41).

The case is now before this Court in order to correct the alleged errors affecting the rights of this petitioner and to reconcile the conflicts of the decision of the United States Court of Appeals for the Fifth Circuit with the decision of the United States Court of Appeals for the Seventh Circuit in the case of *DeCoster* v. *Madigan*, 223 F. 2d 906.

Argument

The petitioner and two others, all members of the Armed Forces at the time, were jointly tried and convicted on June 9, 1951 by a general court-martial on charges of premeditated murder and attempted rape of a Korean woman on or about March 16, 1951. With reference to one of the foregoing three co-defendants, the lower court said in *Wilkinson* v. *Fowler*, (C.A. 5, 1956) 234 F. 2d 615:

> "On writ of habeas corpus, DeCoster, apparently the most guilty one of the three, has since been discharged by the Seventh Circuit, Judge Finnegan dissenting. *DeCoster* v. *Madigan*, 7 Cir., 223 F. 2d 906."

The penalties for murder and attempted rape are set forth in the Table of Maximum Punishments, Manual for Courts-Martial, United States, 1951. At that time the penalty for murder was death or life imprisonment as a court-martial might direct and for attempted rape the penalty was any punishment that a court-martial might direct subject to a maximum limitation of twenty years imprisonment. Obviously, there is no minimum punishment for the latter offense and the sentence could conceivably be nothing.

At the conclusion of the trial and before the Court retired to deliberate on the punishment to be fixed, the Law Officer instructed the Court with respect to the penalty which could be imposed on the murder charge but he made no reference and said absolutely nothing with regard to the penalty which might be imposed for the conviction of attempted rape. (R. 27).

The sentence of the court-martial was that the petitioner should suffer, among other things, the penalty of life imprisonment (R. 27, 28). This action was approved and the record was duly forwarded to the Board of Review in the office of the Judge Advocate General of the Army. On January 15, 1952 the Board of Review reviewed and set aside the murder conviction for lack of evidence (R. 28). The Board of Review then took upon itself the authority to establish an appropriate sentence on the petitioner for the remaining conviction of attempted rape. It decided that twenty years imprisonment was appropriate (R. 29).

The powers and authority of the Board of Review are clearly defined and set out in Section 66 of the Uniform Code of Military Justice. Paragraph (c) of Section 66 states that the Board of Review

> ". . . shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence,

as it finds correct in law and fact and determine, on the basis of the entire record, should be approved."

Paragraph (d) of Section 66 further prescribes the procedure where the Board of Review sets aside the findings and sentence in the following language:

"If the Board of Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed."

In the instant case, the Law Officer gave no instructions to the court-martial with reference to the conviction for attempted rape. The alternative punishments for the conviction of murder were either death or life imprisonment. The court-martial elected the *minimum* sentence of life imprisonment on the petitioner. It is apparent from these circumstances that had the Court been instructed with regard to the conviction on attempted rape (and no charge of murder was involved), that it is certainly probable to assume that the court-martial would not have authorized the *maximum* sentence for attempted rape.

The argument made by the respondent takes the position that the court-martial could not have sentenced the petitioner for a term of life plus any number of years and therefore any instructions by the Law Officer relative to the sentence on the charge of attempted rape would have been superfluous. However, the absurdity of that

line of reasoning was rejected by the Court in *DeCoster v. Madigan, supra*, with the following comment at p. 910:

> "Of course, any suggestion that the court-martial should have sentenced plaintiff for a term of life plus twenty years would be ridiculous, but equally so is the assertion that the court-martial did or intended to impose any part of its sentence for attempted rape. It lacked even the necessary instructions upon which such award of punishment would have to be based. Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here under the statute, only the court-martial was authorized to take this step; it failed to do so."

It cannot be argued, as respondent attempts to do, that the Board of Review merely remitted the excessive portion of petitioner's sentence which became apparent after the disapproval of the conviction on the murder charge. It is illogical to assume that had the court-martial acquitted the petitioner on the murder charge but convicted him only on the charge of attempted rape that the court would have sentenced him to the maximum punishment of twenty years where the record discloses that with the conviction of two serious crimes the sentence imposed by the trial court was the minimum of two alternatives on the more severe offense.

Under the combination of these circumstances together with the statute defining the authority of the Board of Review, it is quite apparent that the Board of Review exceeded its power when it authorized the maximum prison sentence for the remaining conviction of attempted rape. Such action constituted an original imposition of sentence which is clearly beyond the power and authority of the Board of Review as said sentence was never considered

by the trial court since it had received no instructions with reference to that conviction and had made no decision regarding the sentence to be imposed thereon.

The respondent argues that court-martial procedure involves a gross sentence on all offenses for which the accused is convicted. However, it should be noted that a gross sentence is proper when the *sentencing authority refers to all* the crimes for which a defendant is convicted. The prevailing accepted concept of a gross sentence is that by its nature it imposes a single general sentence covering *all* the counts in an indictment as contrasted with a separate sentence imposed on each individual count in the indictment. The significant element of a gross sentence is that it must refer to *all* the counts on which an accused stands charged. In the instant case, the Law Officer instructed the trial court only as to the punishment on the conviction of murder and completely omitted any reference to the conviction of attempted rape. Consequently, the sentence returned by the Court-Martial had reference only to the murder conviction on which it was instructed.

Furthermore, the original sentence, it is significant to note, was the minimum of the alternatives permitted. The Board of Review has affixed as its determination of a proper sentence for the remaining conviction of attempted rape the maximum punishment for that offense. Yet, it has been held in the case of *United States* v. *Voorhees* (1954) 4 U.S.C.M.A. 509, that the resentence must not be arbitrarily severe, even though within the statutory maximum.

In *United States* v. *Voorhees*, supra, the accused was convicted of five violations of the Uniform Code of Military Justice which grew out of certain of his rights regarding his experiences in Korea. A divided Board of

Review set aside all of the findings of guilt except that relating to a single offense. However, it affirmed a sentence of dismissal and total forfeitures as appropriate for the single finding affirmed. The Court of Military Appeals, although divided in its opinion, were in complete accord in reversing the action of the Board of Review in taking upon itself to affirm the original sentence. The Court stated, at page 531:

> "Suffice it that the board of review seems either not to have been aware of the full extent of its powers or, as Judge Latimer suggests, it believed that it could not approve any lesser sentence. We all agree that further action should be taken with regard to the sentence. We further agree that, in view of the dismissal of all the major charges, the interests of justice will best be served by permitting a primary rather than a 'secondary and derivative' redetermination of the sentence. See *United States* v. *Brasher*, 2 U.S.C.M.A. 50, 6 C.R.M. 50.
>
> "For the foregoing reasons, the decision of the Board of Review is reversed and a rehearing is ordered on additional charge I."

Judge Latimer concurring in part and dissenting in part in the case of *United States* v. *Voorhees*, *supra*, stated at p. 542:

> "In *United States* v. *Brashear*, 2 U.S.C.M.A. 50, 52, 6 C.M.R. 50, we had occasion to make an observation which is singularly apt here:
>
> "In a special and peculiar sense the sentence of the law for adjudged misconduct—military or civilian—is the product of a trial court. It alone, of all agencies of the law, is authorized to 'adjudge' the law's penalty. True it is that review agencies are empowered to take

varying sorts of action with respect to this phase of the trial court's task, but their function in this particular is secondary and derivative. They merely 'approve' or 'disapprove', 'affirm' or 'reverse'. The trial court, on the other hand, 'imposes'—it determines as an original, a basic, and a primary proposition."

Judge Latimer then pointed out that the Court of Military Appeals in the usual situation would be powerless to interfere with a sentence affirmed by the Board of Review. He described the procedure that should be followed where the Board of Review has reversed the findings of the court-martial. He said, at page 543:

"One other avenue remained open to the board of review to correct any inequities in this litigation. A rehearing before the court-martial could have been ordered to permit a sentence to be adjudged in the light of the offense committed, if a finding of guilty on the one specification resulted. The board of review elected not to pursue that method and . . . I feel the board of review thereby abused its discretion. On previous occasions when redetermination of the appropriateness of the sentence became necessary, we have been content to remand the case to a board of review for reassessment. This we have done because remand to the trial forum is seldom necessary to achieve a fair and just determination of the sentence. But that is in no way saying that such a proceeding may not be adopted when the only choice left to a board of review is to affirm the sentence or free an accused. That we have previously sought to get clear. *United States* v. *Keith, supra.*"

In noting the similarities between the instant case and *United States* v. *Voorhees, supra*, we quote from the opin-

ion of Judge Latimer wherein he made the following observations at p. 543:

> "Moreover, the board of review could not compensate by a reduction in sentence for those findings it reversed, had it been prone to adopt that procedure. Under those circumstances, a rehearing by the court-martial was not only appropriate, but to my mind, it was mandatory."

It should be noted that the opinion in *United States* v. *Voorhees, supra,* was rendered some two and a half years after the Board of Review acted in the instant case. Yet, even at that date it appeared to the United States Court of Military Appeals that the Board of Review was not aware of its powers as indicated by Judge Latimer's comments at page 543:

> "First, I am not certain the Board of Review was cognizant of the fact it had the power to grant a rehearing where the only vice in the record infested the sentence . . . I do not believe, however, that Congress intended the military judicial system should be without power, in its own sphere, to correct an obvious miscarriage of justice even if it runs only to a sentence. In a fixed sentence, field corrective measures are non-existent so that a rehearing must be considered as an appropriate method of correcting an obviously unfair sentence."

Again reference is made to the opinion of the *United States* v. *Voorhees, supra,* where the Court under similar circumstances as here involved set out the procedure that should be followed in a situation such as we have in the instant case. At page 543, the Court said:

> " . . . having no power to change the type or nature of the sentence, and being precluded from making

the punishment fit the crime, the board should have refused to pass on the appropriateness of the sentence until some military judicial body with the authority to consider all forms of sentence should have had an opportunity to fix a reasonable sentence."

In the instant case where the maximum punishment for the conviction of murder was death and the maximum punishment for the conviction of attempted rape was twenty years, the obvious disparity in these two crimes should be taken into consideration should the Board of Review reverse a finding of guilt on the conviction of murder. It is interesting to note that the opinion in *United States* v. *Voorhees, supra,* considered a similar situation and also made reference to the fact that the Board of Review, by law, had the power to reverse findings but was prohibited from resentencing the accused. The Court stated, at page 544:

"But when what remains is but an insignificant part of the original, justice and a fair trial demand some tailoring of the punishment imposed by the court-martial. When, by law, the body with power to reverse findings is precluded from adjusting a sentence so as to make it appropriate to the conviction, one method of correcting the wrong is by the grant of a rehearing. Here the board of review chose not to follow that course which, under the peculiar facts of this case and the limitations placed on boards of review, is to me against logic, reason and justice. The decision fails to disclose the exercise of a sound, legal discretion in the light of the entire record.

" . . . The extent to which I go is that the final sentence will be determined by some judicial body which is not shackeled so tightly it does not have a free choice of an appropriate sentence."

The Board of Review did not *reduce* the original sentence to twenty years imprisonment as claimed by the respondent. The Board of Review did not "affirm such part or amount of the sentence," that it determined should be approved in accordance with its authority (Section 66). As a result of the reversal as to the finding of guilty on the charge of premeditated murder, the Board of Review was faced with the obvious fact that the original minimum sentence of life imprisonment, which was mandatory for conviction on murder, was now improper since the finding of guilt was reversed. Therefore, there was no valid sentence to be reduced.

The Board of Review took upon itself to exercise independent judgment as to the appropriate sentence on its modified findings and the result was an original imposition of sentence that was never considered by the court-martial. This action, we respectfully submit, was not a reduction of the term of the original sentence nor the remission of the excessive portion of the sentence. To arbitrarily establish the maximum punishment for the one remaining finding of guilt was a clear imposition of an original sentence which is beyond the authority of the Board as defined in Section 66 of the Uniform Code of Military Justice.

The only basis suggested by the respondent for supporting the action of the Board of Review is that this practice regarding sentencing is a characteristic feature of reviewing court-martials and that this construction comports with military understanding and procedure in uncounted numbers of cases over a long period of the history of military justice. The mere fact that such practice has been prevalent in countless numbers of cases over a long period of time does not develop a sense of righteousness to something that is consistently improper. Two wrongs do not make a right. If the military authorities require such

procedure, which they insist is necessary for the expeditious administration of military justice, they should request legislative approval from Congress to modify or amend Section 66 of the Uniform Code of Military Justice so that they would have the proper authority to act in the manner which they feel is necessary.

Finally, with regard to the Government's contention that if the case were sent back to the trial court for a rehearing on the sentence, the original members of the trial court might be dispersed to different sections of the world so that it would be exceedingly difficult if not impossible to have the same court resentence the accused, we wish to refer to the comments of Judge Finnegan in his dissenting opinion in the case of *DeCoster* v. *Madigan, supra*, at page 914, wherein he pointed out that under such circumstances the case did not have to be returned to the identical general court-martial.

Any other interpretation of Section 66 of the Uniform Code of Military Justice would concentrate too much power in the Board of Review. Under the respondent's contentions it has the power to affirm or reverse findings of guilt and to affirm sentences "as it finds correct in law and fact and determine on the basis of the entire record should be approved". That conclusion is certainly not within the legislative intent as enacted by Congress. Under that theory the result would be the combination of judge, jury and hangman within the same individual body. This concept of justice is completely revolting to our ideals of law—military or civilian.

The entire issue involved herein was clearly and succintly summarized in the district court's order (R. 22, 23) granting the petitioner's writ of habeas corpus. The order stated:

> "Under the record of the military court it appears he should be punished, but it is not for his Court on

Nos. 619 and 620

In the Supreme Court of the United States

OCTOBER TERM, 1956

CHESTER E. JACKSON, PETITIONER

v.

JOHN C. TAYLOR, ACTING WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRIEL L. FOWLER, PETITIONER

v.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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PETITION NOT PRINTED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 620

HARRIEL L. FOWLER,

Petitioner

v.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent

BRIEF OF THE PETITIONER ON THE MERITS

Reference to the Opinions in the Courts Below

The United States District Court for the Northern District of Georgia filed an unreported opinion (R. 22) in this case *sub nom. Fowler* v. *Hardwick*, decided December 27, 1955, wherein the Court granted the petitioner's application for a writ of *habeas corpus* and ordered his release upon posting bond to answer to the final judgment upon appeal. This judgment was appealed by the respondent to the United States Court of Appeals for the Fifth Circuit where it was reversed in a per curiam decision, 234 F. 2d 615 (June 27, 1956).

Statement of the Grounds on Which Jurisdiction of This Court Is Involved

The jurisdiction of this Court to review this case is based on a conflict of decisions of the United States Court of Appeals for the Fifth Circuit in the instant case of *Wilkinson* v. *Fowler*, 234 F. 2d 615, with the decision of the United States Court of Appeals for the Seventh Circuit in the case of *DeCoster* v. *Madigan*, 223 F. 2d 906. Both defendants were involved in the same court-martial proceedings from which this appeal stems.

The District Court's order for the petitioner's release was reversed by the United States Court of Appeals for the Fifth Circuit on June 27, 1956. Within ninety days after the entry of the judgment of the Court of Appeals, the petition for certiorari to review the judgment of the Court of Appeals together with a motion to proceed in *forma pauperis*, with petitioner's affidavit attached, were filed in this Court in compliance with Rules 22, 23 and 53 of the Revised Rules of the Supreme Court of the United States.

The statutory provisions upon which the jurisdiction of this Court is invoked to review this case are as follows:

Title 28, U.S.C.A., Section 1254, provides in pertinent part as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Rules 19 of the Revised Rules of the Supreme Court of the United States provides as follows:

"(1) A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted

only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered:

. . . . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; . . ."

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V, provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article of War 92, formerly Title 10, U.S.C.A. Section 1564 (recently revised and recodified as Title 10, U.S.C.A. Section 918, P.L. 1028, 84th. Congress, 2d Session, approved August 10, 1956) provides:

"Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder

not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct; Provided, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

Article of War 96, formerly Title 10, U.S.C.A. Section 1568 (recently revised and recodified as Title 10, U.S.C.A. Section 934, P.L. 1028, 84th. Congress, 2d Session, approved August 10, 1956) provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. May 5, 1950, c. 169, Section 1, 64 Stat. 142."

Section 66 of the Uniform Code of Military Justice, formerly Title 50, U.S.C.A. Section 653 (recently revised and recodified as Title 10, U.S.C.A. Section 866, P.L. 1028, 84th. Congress, 2d Session, approved August 10, 1956) provides as follows:

"(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal Court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board

of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determine, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocate General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocate General and by the boards of review. May 5, 1950, c. 169, Section 1, 64 Stat. 128."

habeas corpus to fix his punishment. The military court gave him a life sentence. Had they given him twenty years for assault with attempt to rape that sentence would now be good, the murder conviction being set aside. *This Court cannot assume that had he not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years.*" (Emphasis supplied)

Conclusion

Since it appears that the Board of Review did not comply with its prescribed powers as defined in Section 66(d) of the Uniform Code of Military Justice and since the arbitrary, harsh imposition of sentence was outside its authority as set out in Section 66(c), it follows that the decision of the Court of Appeals for the Fifth Circuit in this case should be reversed and the decision of the United States District Court for the Northern District of Georgia, wherein the petitioner was granted a writ of habeas corpus, should be sustained and the petitioner be released from further custody.

Respectfully submitted,

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JOHN C. TAYLOR, ACTING WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 620

HARRIEL L. FOWLER, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CURCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

In No. 619, the opinion of the Court of Appeals for the Third Circuit (R. 16–22) is reported at 234 F.

2d 611. The opinion of the District Court (R. 7–14) is reported at 135 F. Supp. 776.

In No. 620, the opinion of the Court of Appeals for the Fifth Circuit (R. 39–40) is reported at 234 F. 2d 615. The opinion of the District Court (R. 22–23) is not reported.

JURISDICTION

In No. 619, the judgment of the Court of Appeals was entered on May 31, 1956 (R. 22). The petition for a writ of certiorari was filed August 21, 1956, and granted on December 10, 1956 (R. 23). 352 U. S. 940.

In No. 620, the judgment of the Court of Appeals was entered on June 27, 1956 (R. 40). The petition for a writ of certiorari was filed on September 25, 1956, and was granted on December 10, 1956 (R. 41). 352 U. S. 940.

In both cases, the jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, after a general court-martial had convicted a soldier of the two crimes of premeditated murder and attempted rape and imposed one aggregate sentence of life imprisonment for both offenses, the Army Board of Review, after reversing the finding of guilt on the murder charge, had authority to reduce the sentence to the maximum sentence for attempted rape.

STATUTES INVOLVED

Article of War 92 (10 U. S. C. (1946 ed., Supp. IV) 1564) provided:

> *Murder; rape* (*article 92*).
>
> Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided,* That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Article of War 96 (10 U. S. C. (1946 ed.) 1568) provided:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Article of War 47 (10 U. S. C. (1946 ed., Supp. IV) 1518 provided in part:

> (d) *Approval.*

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: * * *

* * * * *

(f) *Powers incident to power to approve.*

The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of article 52.

Article of War 50 (10 U. S. C. (1946 ed., Supp. IV) 1521) provided in part:

§ 1521. *Appellate review (article 50)—(a) Board of Review; judicial council.*

The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department; * * *

* * * * *

(d) *Action by Board of Review when approval by President or confirming action is required.*

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted

to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided,* That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advo-

cate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial leg ly insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.

* * * * *

(g) *Weighing evidence.*

In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

Article 66 of the Uniform Code of Military Justice (50 U. S. C. (1952 ed.) 653)[1] provides in pertinent part:

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[1] This section has recently been revised, and recodified as 10 U. S. C. 866, P. L. 1028, 84th Cong., 2d Sess. (approved August 10, 1956). The changes in language do not appear to be pertinent to this case.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d). If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the Presi-

dent or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

STATEMENT

Petitioners Fowler and Jackson were soldiers in the United States Army in Korea when, on June 9, 1951, they were found guilty by an Army general court-martial, there convened, of the premeditated murder of a Korean woman on March 16, 1951, in violation of Article of War 92 (10 U. S. C. (1946 ed., Supp. IV), 1564, *supra*) and of attempted rape, in violation of Article of War 96 (10 U. S. C. (1946 ed.) 1568, *supra*) (No. 619, R. a-b; No. 620, R. 1-3).[2] After the findings of guilt were returned by the court-martial (a procedure which corresponds to verdict in civilian courts), the law officer instructed its members in open court as follows (No. 620, R. 27):[3]

---

[2] Petitioners were tried with Carl A. De Coster (see *De Coster* v. *Madigan*, 223 F. 2d 906 (C. A. 7)). All three were convicted of the same offenses, given the same sentence, and received the same treatment from the board of review.

[3] Although the charges under which petitioners were tried alleged violations of the Articles of War, the Uniform Code of Military Justice became effective on May 31, 1951, so that the trial on June 8, 1951, and subsequent proceedings, were held under the procedures proscribed by the Uniform Code. Under Article 51 (b) and (c) of that Code (10 U. S. C. 851 (b) and (c)), the law officer no longer deliberates with the court but rules on questions of law which arise during the proceedings. "[B]efore a vote is taken on the findings," he is required to instruct the court

> LO [Law Officer]: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949, page 296, "Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct." The court will be closed.[4]

Thereafter, the court-martial sentenced each petitioner to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for the term of his natural life (No. 620, R. 27–28). The convening authority of the general court-martial, the Commanding General of the 2d Infantry Division, approved the sentences on July 3, 1951 (No. 620, R. 28).

Pursuant to Article 66, Uniform Code of Military Justice, 10 U. S. C. 866, the record of trial was reviewed, on January 15, 1952, by a board of review in the office of the Judge Advocate General of the Army. The board held that it was not convinced beyond a reasonable doubt of petitioners' guilt of premeditated

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members as to the elements of the offense, and to give four other instructions specified in Article 51(c). None of these relates to sentencing. The Manual for Courts Martial, United States, 1951, App. 8a, states in a section relating to sentence procedure (p. 521) that "before closing, the LO [Law Officer] may advise the court of the maximum punishment which may be imposed (76b (1))", and that "the court will adjudge a single sentence for all the offenses of which the accused was found guilty."

[4] The Manual reference alluded to by the law officer repeats the punishment provision of Article of War 92 (10 U. S. C. (1946 ed., Supp. IV) 1564), *supra*, p. 3.

murder. It therefore set aside the convictions for premeditated murder while sustaining the convictions for attempted rape. Because the maximum permissible sentence for attempted rape was twenty years' imprisonment,[5] the board noted that the aggregate sentences of confinement at hard labor for life were improper. The board then concluded that the maximum sentence for attempted rape was appropriate for each accused "[u]nder the vicious circumstances of this case," and took the following action (CM 347258, *United States* v. *Fowler,* 2 CMR 336, at pp. 345–346; No. 620, R. 28–29):

ACTION BY THE BOARD

> For the reasons stated, the board of review finds as to each accused: that the approved findings of guilty of Specification 1 of the Charge and the Charge [premeditated murder] are incorrect, in law and fact and the same are set aside; that the approved finding of guilty of Specification 2 of the Charge and the approved finding of guilty of a violation of the 96th Article of War [attempted rape] are correct in law and fact; and that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact. The board of review having determined upon the basis of the entire record that the approved findings of guilty, except as thus set aside, and the approved sentence, as modified, should be approved as to each accused, such

[5] Manual for Courts-Martial, United States, 1951, par. 127*c*, p. 225.

findings, except as thus set aside, and sentences, as modified, are

Affirmed.

Petitioners then filed petitions with the United States Court of Military Appeals seeking further review of their case. They raised no question as to the authority of the board of review to modify the sentence in the manner described above (No. 619, R. 17; No. 620, R. 30). These petitions were denied without opinion. *United States* v. *Fowler, et al.*, 1 USCMA 713.

Petitioner Jackson made his first challenge to the sentence modification by the board of review in his petition for a writ of habeas corpus to the United States District Court for the Middle District of Pennsylvania, where he contended that "the action of the Review Board in reserving twenty (20) years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reversed and set aside the conviction, was null and void" (No. 619, R. e). In an opinion denying the writ and discharging the rule to show cause (*Jackson* v. *Humphrey*, 135 F. Supp. 776; No. 619, R. 7–14), the District Court held that the board of review, on reversing the murder count, properly modified the sentence and was not required to order a new trial or remand the case for resentencing by the general court-martial.

The Court of Appeals, in its unanimous opinion affirming the District Court's holding, expressly rejected the reasoning of *De Coster* v. *Madigan*, 223 F. 2d 906 (C. A. 7), a habeas corpus action where the

codefendant De Coster (see fn. 2, *supra*, p. 8) was released on the ground that, when the murder conviction was set aside, the board of review had no power to fix the sentence for attempted rape (No. 619, R. 16–22).

In his petition for a writ of habeas corpus to the United States District Court for the Northern District of Georgia, petitioner Fowler similarly attacked the sentence as modified by the board of review. Among other things, he alleged that "* * * the Board of Review was not vested with any authority to give the petitioner a 20-year sentence and same is a void commitment under which the petitioner may not legally be held" (No. 620, R. 5, 30). In an unpublished opinion, the District Court agreed with the majority in *De Coster* v. *Madigan, supra,* 223 F. 2d 906 (C. A. 7), and granted the writ, stating: "This Court cannot assume that had he not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years" (No. 620, R. 23). This decision was reversed in a *per curiam* opinion by the Court of Appeals for the Fifth Circuit (No. 620, R. 39–40), on the authority of *Jackson* v. *Taylor,* 234 F. 2d 611 (C. A. 3), *Jackson* v. *Humphrey,* 135 F. Supp. 776 (M. D. Pa.), and the dissenting opinion in *De Coster* v. *Madigan,* 223 F. 2d 906 (C. A. 7).[6]

[6] While the government was of the view that the *De Coster* opinion and holding were incorrect, it did not seek certiorari because the ruling seemed limited, in the words of the court, to "the curious combination of circumstances involved in this case", 223 F. 2d at p. 909, and the decision (as distinguished from some of the language in the opinion) did not necessarily lay down a

SUMMARY OF ARGUMENT

Petitioners were convicted of premeditated murder and attempted rape. The law officer of the court-martial thereafter instructed that the sentence for premeditated murder could be only life imprisonment or death, but he gave no instruction as to the punishment for attempted rape. A sentence to life imprisonment was imposed. Later, on mandatory review, the board of review disapproved the conviction for premediated murder, affirmed the conviction for attempted rape, and reduced the sentence to twenty years' imprisonment. The issue is whether the board of review has the power thus to determine an appropriate sentence for the affirmed conviction of attempted rape.

I

In military law, a single gross sentence is imposed by the fact-finders for all of the offenses of which the accused has been found guilty. *Carter* v. *Mc-*

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broad rule applicable to court-martial cases not involving the same unusual set of circumstances. The Seventh Circuit reasoned that, since the law officer had instructed the court only as to the penalty for murder, the court intended the penalty of life imprisonment to apply only against the murder finding, and that, when the murder finding was reversed, the defendant remained unsentenced for the rape. See *infra*, p. 29. On this assumption, it found that, when the board of review reduced the original sentence, it was not modifying an existing sentence but sentencing in the first instance, an authority not conferred upon it by Article 66, *supra*, p. 7. Conflict with the instant cases developed only after the time for petitioning for certiorari in *De Coster* (as extended for the maximum period) had expired. Neither of the district court decisions in the *Jackson* and *Fowler* cases had been rendered by the time the government's right to petition in *De Coster* expired.

Claughry, 183 U. S. 365. Such a sentence in the entirety was imposed here. The fact that the law officer instructed only as to the penalty for murder is explained by the circumstance that an instruction as to the penalty for an attempted rape would have been a futility: an accused cannot be confined for a period in excess of life imprisonment (the minimum penalty for premeditated murder). Accordingly, the instruction nowise detracts from the conclusive presumption that the sentence represents a penalty covering both of the convictions of each accused. This conclusion is fortified by the facts (1) that the law member is not required to give any instruction concerning the imposition of sentence and (2) that the court-martial members have an unqualified duty to impose a single sentence covering all of the convictions which they return. The conflicting opinion of the Court of Appeals for the Seventh Circuit in *De Coster* v. *Madigan,* 223 F. 2d 906, fails to give effect to the distinctive features of military practice.

II

The sentence was properly adjusted by the board of review. In military practice, broad powers over the sentence are lodged in various reviewing authorities. The powers of review, modification, and sentence-adjustment cannot, in the nature of things, be committed to courts-martial. The court-martial is a temporary organ, having neither continuity nor permanent situs, which acts essentially as a fact-finding body or lay jury during its limited tenure. The power to adjust sentences upon review—a function essen-

tially judicial and executive in character—has always rested elsewhere.

A. The first stage of review is provided by the convening authority—the officer who has assembled the particular court-martial and directed it to try the particular case. His review is mandatory in every case where a finding of guilt is reached and a sentence is imposed. He may not increase the punishment imposed by the court-martial, and he cannot alter a finding of not guilty, but within these limits he is unfettered (Article 62). Congress has given him the power to weigh the facts, determine the credibility of witnesses, disapprove findings of guilt which he regards as erroneous either in fact or law, and determine sentence appropriateness without regard to what the court-martial might have done had it considered only the approved findings (Article 64). The power to suspend sentence is also lodged in the convening authority, rather than in the court-martial (Article 71). The court-martial is bound to impose a minimum sentence to life imprisonment for premeditated or felony murder, but the convening authority may reduce this. All cases returned by the board of review or the United States Court of Military Appeals for rehearing (retrial) on some or all of the charges are returned to the appropriate convening authority. He may dismiss the charges if he deems a rehearing impracticable. If the accused was convicted of several charges and a hearing has been ordered as to some, but not all, the convening authority may dismiss those ordered reheard and deter-

mine an appropriate sentence for those affirmed, so long as the sentence he approves does not exceed that imposed by the court-martial and is within legal limits.

The convening authority's power to alter sentences did not begin with the enactment of the Uniform Code of Military Justice, 10 U. S. C. 801 *et seq.*, the present law. As early as 1806, Congress expressly gave him the power to remit or mitigate sentences to confinement, and it has continued this power in each successive enactment since that time. Before 1916, the convening authority could only approve or disapprove a finding in its entirety, but since that time he has been authorized to approve any lesser offense necessarily included in that found by the court-martial. He has never been limited to consideration of errors of law, but has always been authorized to exercise his discretion in relation to the entire proceedings. This Court has recognized this broad power. *Carter* v. *McClaughry*, 183 U. S. 365.

Article of War 47 (10 U. S. C. (1946 ed., Supp IV) 1518) and Manual for Courts-Martial, 1949, par. 7*b*, spelled out the powers of the convening authority, noted above. The legislative history of the present Code shows that Congress intended to continue these powers, and the statute permits of no other construction. *United States* v. *Field*, 5 USCMA 379, 18 CMR 3.

B. The second stage of review in military law is review by boards of review. Each board is composed of three lawyers, either military or civilian, who sit in the offices of the respective Judge Advocates General. Review by such a board is mandatory in cases

of the type here involved. Boards of review are authorized to weigh facts, determine credibility of witnesses, consider errors of law, and affirm such findings (and only those) which they find to be correct in law and in fact. In addition, they have been directed by Congress to affirm only that sentence to confinement, or any part thereof, which they believe to be appropriate and which does not exceed the sentence adjudged by the court-martial. Thus, there is duplicated, at the second stage of review, two of the most important powers of the convening authority: the power to consider the facts *de novo* and the power to determine sentence appropriateness.

Boards of review first came into being through a series of departmental orders issued by the Army during the first World War, and were first given statutory recognition in 1920. At that time, Congress gave them power to review records for legal sufficiency, a power which was to be exercised in concert with the Judge Advocate General. If the board and the Judge Advocate General disagreed, the case was to be forwarded to the Secretary of War for action by the President. The President was given absolute discretion to approve or disapprove all or any part of the findings or sentence, a power which he subsequently delegated in large part to the Secretary of War.

In 1948, Congress gave boards of review the power to weigh facts as well as determine legal sufficiency, but still did not give them the power to determine sentence appropriateness. However, the latter power was given, at this time, to the Judge Advocate Gen-

eral (who was to act concurrently with the board of review in determining the sufficiency of the record) and to the Judicial Council (a body of three general officers of the Judge Advocate General's Corps to be constituted in the Office of the Judge Advocate General).

During the hearings on the Uniform Code (which became effective in 1951), it was proposed that boards of review be authorized to determine sentence appropriateness as well as the factual and legal sufficiency of the record. Congress adopted the proposal, over opposition, as a measure which was in the interests of the accused and would promote uniformity of sentences throughout the armed forces. Article 66 of the present Code authorizes boards of review to "* * * affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

The United States Court of Military Appeals provides the third and last stage of appellate review in the military system, and reviews questions of law in appropriate cases. That court has often had occasion to consider the extent of the power over sentences given by Congress to boards of review, and has concluded that the boards are entitled to determine sentence appropriateness without regard to what the court-martial might have done had it considered only the findings affirmed by the board. This construction is the only one which gives full effect to the language of the statute, the intent of Congress as expressed in

the legislative history, and Article 66's background of prior law. Indeed, we think no other construction is possible if two established features of military law, both having long and unbroken histories, are to coexist: (1) the practice whereby a court-martial imposes a single sentence in gross; (2) the investment in reviewing authorities of power to modify both the findings of the court-martial and the sentence imposed by the court-martial.

III

The board of review reduced the sentence here to confinement to the maximum permissible for attempted rape. That was an appropriate sentence on the facts. As revealed in the opinion of the board of review (CM 347258, *United States* v. *Fowler*, 2 CMR 336), a vicious offense had been committed. Certainly, reasonable men could conclude that the maximum penalty was warranted. In all events, the question of severity of sentence is not a matter which may be considered on habeas corpus if the sentence is legal.

ARGUMENT

The problem in these cases arises because of the practice, peculiar to military law, of fixing one gross sentence, no matter the number of offenses of which an accused may be found guilty. Here, the court-martial, on finding petitioners guilty of both murder and attempted rape, fixed the sentence at life imprisonment. When the board of review set aside the finding of murder, it adjusted the sentence for attempted rape to that which it found appropriate.

The issue is whether it had power to do so or whether the cases had to be referred back to the court-martial for resentencing on the attempted rape charge.[7] We shall urge that, in the light of the established sentencing procedure in military practice and the powers of the board of review with respect to sentences, the adjustment in these cases was within the power of the board of review and appropriate to the circumstances.

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[7] There is doubt as to whether the issue raised by petitioner is cognizable in the first instance on habeas corpus. It would appear that petitioners' failure to exhaust their military remedies before the board of review, the Judge Advocate General, and the United States Court of Military Appeals would preclude review by the courts on habeas corpus, even if the issue that they raise went to the jurisdiction of the general court-martial or the board of review. See *Gusik* v. *Schilder*, 340 U. S. 128; *Whelchel* v. *McDonald*, 340 U. S. 122, 124; *Burns* v. *Wilson*, 346 U. S. 137, 142 (opinion of Mr. Chief Justice Vinson). This doctrine is particularly apposite to these cases since the remedy of rehearing, which petitioners contend they should have been granted when the board of review reversed the murder finding, could have been sought from the board of review (Art. 66 (d), UCMJ, 10 U. S. C. 866 (d); *United States* v. *Jackson*, 2 USCMA 179) or the Court of Military Appeals (Art. 67 (e), UCMJ, 10 U. S. C. 867 (e)). Their present objections, raised for the first time before the federal courts on collateral attack, would seem to be foreclosed. See Article 76, UCMJ, 10 U. S. C. 876 (providing that the sentences of courts-martial as approved, reviewed, or affirmed shall be final and conclusive on all courts of the United States subject only to action upon a petition for a new trial); and see *Burns* v. *Wilson*, 346 U. S. 137, 146; *Hiatt* v. *Brown*, 339 U. S. 103, 111; *In re Grimley*, 137 U. S. 147, 150. The term "new trial" appears to be a word of art in military law, for it is used only in connection with relief sought on grounds of newly discovered evidence or fraud on the court. Article 73, UCMJ, 10 U. S. C. 873, MCM, 1951, par. 109–111, pp. 176–183.

The procedure which is followed in military law is that which has been enacted by Congress[8] and promulgated by the President.[9] As was said by Chief Justice Vinson, in *Burns* v. *Wilson*, 346 U. S. 137, 140:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that to Congress.

Accordingly, it will be necessary to summarize military review procedure so as to fix the place of the board of review in the appellate structure and to ex-

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[8] The basic structural framework of military law today is the Uniform Code of Military Justice, which has been in effect for nearly six years (Act of May 5, 1950, 64 Stat. 108, 50 U. S. C. (1952 ed.) 551–736, effective May 31, 1951, recently revised and recodified as 10 U. S. C. 801, *et seq.*, P. L. 1028, 84th Cong., 2d Sess. (approved August 10, 1956)). To avoid unnecessary repetition, it will be referred to hereafter as "the Code", or as "UCMJ."

[9] Article 36 of the Code, 10 U. S. C. 836, provides that "The Procedure, including modes of proof, in cases before courts-martial, * * * may be prescribed by the President by regulations * * *" Pursuant to this grant of authority, the President promulgated Executive Order 10214, 16 F. R. 1303, which is more widely known as the Manual for Courts-Martial, United States, 1951, and which will be referred to hereafter as "the Manual".

plain in detail its powers in cases tried by general court-martial.

General courts-martial are composed of at least five members and a law officer who serves as a judge (Article 16). They are "* * * lawful tribunals, with authority to finally determine any case over which they have jurisdiction * * *",[10] and are called into being by an officer exercising general court-martial authority (Article 34). The officer exercising general court-martial jurisdiction, commonly referred to as the convening authority, derives the power to constitute a court-martial and authorize it to proceed from Article 22 of the Code, 10 U. S. C. 822.

In addition to convening the court-martial, the convening authority is the first to act as a reviewing authority where there has been a finding of guilt by the court-martial (Article 60). This review is automatic. When acting in review, the convening authority is entitled to weigh the facts, judge the credibility of witnesses, and make findings of fact. He also determines the legal sufficiency of the convictions. With respect to the sentence, he is authorized not only to approve a legal sentence, but also to determine sentence appropriateness. However, he cannot increase the sentence imposed by the court-martial. In net effect, he has the power to disapprove any conviction and to reduce any sentence involving confinement if he, in his discretion, believes it proper to do so (Article 64). He has powers over

[10] *Grafton* v. *United States*, 206 U. S. 333, 347; see also *Hiatt* v. *Brown*, 339 U. S. 103, 110.

a sentence to confinement which the court-martial does not have, for he may suspend it, while the court-martial may not (Article 71). Furthermore, he may reduce a sentence of life imprisonment even though the court-martial was bound to impose it as a mandatory minimum sentence (Manual for Courts-Martial, par. 88*c*, p. 148).

The second stage of appellate review in the military system is review by a board of review. These boards sit in the offices of the respective Judge Advocates General, and review by such a board is mandatory in all cases (such as those here involved) where the sentence approved by the convening authority includes a punitive discharge or some more rigorous punishment (Article 66). The boards of review consider the law, the facts, and the sentence. They are authorized to approve only that sentence which they believe to be appropriate for the affirmed convictions. They may not go outside the record to determine legal or factual sufficiency, but may do so to determine jurisdiction or a question of insanity."

The third and final stage of appellate review in the military system is provided by the United States Court of Military Appeals. Review of capital cases and cases involving a general or flag officer is mandatory. If the board of review has affirmed a sentence which includes a punitive discharge or some more rigorous punishment, the accused may petition the Court of Military Appeals for review. The court

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" Rule IX F, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, Dept. of Army Bulletin No. 9, dated June 8, 1951.

grants review for good cause and considers only questions of law. The Judge Advocate General may also certify questions to the court for review, if he disagrees with the decision of the board of review (Article 67).

I

THE SENTENCE OF THE COURT-MARTIAL COVERED THE CONVICTIONS BOTH FOR MURDER AND ATTEMPTED RAPE

A. COURTS-MARTIAL ARE AUTHORIZED TO IMPOSE ONLY A SINGLE SENTENCE, NO MATTER THE NUMBER OF CHARGES OF WHICH THE ACCUSED IS FOUND GUILTY

Courts-martial have never been authorized to impose separate sentences for different offenses at a single trial. A single sentence is always imposed, regardless of the number of charges and specifications. Unlike the ordinary practice in civilian tribunals, this sentence is adjudged by the fact-finders (Article 51). Although Congress has several times revised the military code, it has made no specific provision respecting sentences, other than to impose certain limitations on their severity. The single, or gross, sentence practice in military law may thus be said to have implicit Congressional approval. The provisions of Articles 18, 19, and 20, Uniform Code of Military Justice, limiting the punishments which may be imposed by general, special, and summary courts-martial, respectively, clearly contemplate that a single sentence will be imposed in every case.

The Manual for Courts-Martial specifically provides (Appendix 8a, p. 521):

> NOTE.—The sentence must be within the maximum limits prescribed in chapter XXV and

> within the jurisdiction of the court to adjudge. As to rehearings and new trials see 81*d* and Article 63. *The court will adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused.* [Emphasis added.]

As the United States Court of Military Appeals stated in *United States* v. *Keith,* 1 USCMA 442, 448, 4 CMR 34:

> * * * The concurrent sentence, in the sense in which that device is utilized in the administration of criminal law in the civilian community, is entirely without precedent in military procedure. See Manual for Courts-Martial, supra, paragraphs 76, 125, 126, 127. Under military law a single inclusive sentence is imposed—the sum of individual punitive actions deemed legal and adequate—regardless of the number or character of the offenses of which the accused has been convicted. It will be obvious that a rule which has its basis in a concurrent sentence situation is not an appropriate subject for importation into a system in which the instrument lying at the basis of the principle is unknown, and a unitary sentence is always assessed.

The validity of the practice of imposing a single sentence upon conviction by court-martial of more than one offense was recognized, and the practice specifically approved by this Court in *Carter* v. *McClaughry,* 183 U. S. 365, 393:

> We understand the rule established by military usage to be "that the sentence of a court

martial shall be, in every case, an *entirety;* that is to say, that there shall be but a single sentence covering all the convictions on all charges and specifications upon which the accused is found guilty, however separate and distinct may be the offences found, and however different may be the punishments called for by the offenses." 1 Winthrop (2d ed.) 614.[12] [Emphasis in original].

This Court has also placed its stamp of approval on other cases in which a gross sentence has been imposed. *E. g., Swains* v. *United States,* 165 U. S. 553; *United States* v. *Fletcher,* 148 U. S. 84.

B. THE SENTENCE HERE COVERED THE CHARGE OF ATTEMPTED RAPE

Petitioners argue that, whatever the normal rule may be, this case does not fall within it, because of certain events which occurred at the court-martial trial. The law officer followed the normal—though not required—procedure of advising the court, *after* findings (verdict) and before sentence, as to the punishment it might impose.[13] He told the court-martial that, having already found the petitioners guilty of premeditated murder, it could sentence only to life imprisonment or death. This was clearly correct, for the former punishment represents the mandatory minimum for that offense. He said nothing as to the penalty for attempted rape. The court-martial then deliberated and adjudged a gross sen-

[12] To the same effect are *Rose ex rel. Carter* v. *Roberts,* 99 Fed. 948, 950 (C. A. 2), certiorari denied, 176 U. S. 684; *Mosher* v. *Hudspeth,* 123 F. 2d 401, 402 (C. A. 10), certiorari denied, 316 U. S. 670.

[13] Manual for Courts-Martial, 1951, par. 39b, p. 55, 76b (1), p. 123.

tence to life imprisonment. From these circumstances petitioners reason that punishment for attempted rape was not in fact considered by the court-martial and was not a component of the sentence; and that arithmetic establishes that no punishment was imposed for attempted rape, inasmuch as the sentences imposed represent the minimum for premeditated murder alone.

A full answer to this line of argument was given by the court below in No. 619. As Judge Hastie stated (R. 19–20):

> Ingenious though this line of argument is, and persuasive though it has been to a majority of the division which decided *De Coster* v. *Madigan, supra,* in another circuit, we reject it. To begin with, it was not possible for the court which found the petitioner guilty of both premeditated murder and attempted rape to order imprisonment for either a longer or a shorter period than it did. For under military law the death sentence is the only lawful alternative to life imprisonment, once a defendant has been found guilty of premeditated murder, whether alone or in addition to some other crime. Thus, the failure of the law officer to say anything to the court about the maximum punishment for attempted rape suggests nothing more than that he understood how pointless such an explanation would have been in the posture of this case. Moreover, the arithmetical argument that a sentence for two offenses must be longer than the minimum sentence required for one of them ignores both the practical difficulty of imprisoning for life plus any number of years and the absence

of provision for any such oddity in the rules which control military sentencing.

The first portion of petitioners' argument also ignores the fact that the law officer is not *bound* to instruct upon the sentence, and that, if he does not, the members nevertheless have an absolute duty "to vote for a proper sentence for the offense or *offenses* of which the accused has been found guilty, * * *".[14]

The arithmetical argument is of no greater aid to petitioners. Even the majority opinion in *De Coster* v. *Madigan*, 223 F. 2d 906, 910 (C. A. 7), concedes that "any suggestion that the court-martial should have sentenced plaintiff[s] for a term of life plus twenty years would be ridiculous * * *". Petitioners can hardly mean to suggest that, had the court-martial members considered both offenses, they would have been bound to reason, "We *must* give at least life on the murder offense, we can give twenty years in addition on the offense of attempted rape, and therefore we will sentence petitioners to die for the murder." Yet, only if petitioners are willing to say that the existence of a conviction for attempted rape would require the imposition of the maximum penalty, death, for premeditated murder, can they argue that the sentence actually adjudged—life imprisonment—is evidence that they were not sentenced for both offenses.

The only authority which supports petitioners' position is *De Coster* v. *Madigan, supra*, 223 F. 2d

[14] Manual for Courts-Martial, 1951, par. 76*b* (2), p. 124; emphasis added.

906, an opinion which the courts of appeal in the instant cases expressly declined to follow. We submit that *De Coster* is wrong for the following reasons:

(1) That opinion ignores the fact that court-martial sentences to confinement have always been imposed as an entirety; that is, a single sentence covering all the convictions on all the charges and specifications, however separate and distinct the offenses may be.

(2) It ignores the fact that court-martial members have a duty to consider all of the findings in deliberating on the sentence.

(3) It ignores the fact, discussed *infra* (Point II), that boards of review are entitled to weigh facts and determine sentence appropriateness without regard to what the court-martial would have done had it been faced with only the affirmed findings of guilt.[15]

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[15] A note in 65 Yale Law Journal 413, 417–418, says of the *De Coster* decision:

> It is impossible to justify the court's conclusion that the court-martial had never intended or authorized a sentence "in gross." The accepted military usage is that a mandatory sentence imposed in a multiple-conviction case covers all the convictions. And the irrefutable fact is that De Coster was convicted of both murder and attempted rape. True, the court-martial sentence was the minimum permissible for the murder charge alone. But, short of the death penalty, the court-martial could not have imposed a greater sentence upon De Coster no matter how many offenses he was convicted of, and no matter how reprehensible they were. Moreover, the omission of sentencing instructions on the attempted rape conviction has no relevance. It did not divest the court-martial of sentencing jurisdiction, nor in any way prejudice the accused. The Uniform Code and the *Courts-Martial Manual* make it clear that, once the accused has been duly convicted, sentencing instructions are not prerequisite to valid imposition of the sentence. They are discretionary

II

REVIEWING AUTHORITIES MAY APPROVE ONLY THOSE FINDINGS OF GUILTY AND SUCH PORTIONS OF THE SENTENCE AS ARE FOUND CORRECT IN LAW AND FACT. IN DETERMINING AN APPROPRIATE SENTENCE, THEY ARE NOT BOUND BY WHAT THE COURT-MARTIAL MIGHT HAVE IMPOSED HAD IT CONSIDERED ONLY THE FINDINGS APPROVED

Assuming, as we believe one must, that the life sentence imposed by the court-martial covered both offenses of which the accused were found guilty, the question remains—Where did the power to adjust the sentence lie when the murder convictions were disapproved? We shall show that this power to correct sentence has always been lodged in the reviewing authorities. The convening authority has always possessed it. And it was specifically granted to boards of review by recent legislation.

A. THE CONVENING AUTHORITY HAS ALWAYS HAD BROAD POWER TO ADJUST SENTENCES WITHOUT REGARD TO WHAT THE COURT-MARTIAL MIGHT HAVE DONE

1. In acting in a case on review, the convening authority has the power to "* * * approve only such findings of guilty, *and the sentence or such part or amount of the sentence,* as he finds correct in law and fact * * *" (Article 64). (Emphasis added.) In addition, he has absolute discretion to remit or suspend any part of the sentence, except a death sen-

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with the law officer. And the discretion exercised in De Coster could not have been prejudicial: the identical sentence would necessarily have been imposed with or without the omitted instructions.

tence (Article 71). He is not authorized to increase the punishment adjudged and he cannot alter a finding of not guilty (Article 62); he cannot go outside the record to find evidence to sustain the findings;[16] but, subject to these limitations, he is unfettered. He must determine legal sufficiency, factual correctness, and sentence appropriateness. To that end, the convening authority is entitled to weigh the facts, determine the credibility of witnesses, and even consider evidence of innocence and evidence bearing on sentence appropriateness which may be outside the record of trial.[17] Although courts-martial are obliged to adjudge a minimum sentence of life imprisonment for premeditated murder, the convening authority is not bound by this limitation.[18]

The congressional grant of power over sentences has been construed to mean that the convening authority must give individual attention to each case.[19] Having given his consideration, he may affirm any legal term of confinement which is no greater than that adjudged by the court-martial and which he personally deems appropriate for the offenses approved.

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[16] *United States* v. *Duffy*, 3 USCMA 20, 11 CMR 20.

[17] *United States* v. *Massey*, 5 USCMA 514, 18 CMR 138; *United States* v. *Lanford*, 6 USCMA 371, 20 CMR 87.

[18] Manual for Courts-Martial, 1951, par. 88c, p. 148; *United States* v. *Jefferson*, 7 USCMA 193, 21 CMR 319.

[19] *United States* v. *Wise*, 6 USCMA 472, 20 CMR 188.

The current Manual for Courts-Martial, par. 88, pp. 147–148, treats the convening authority's power to deal with the sentence in the following language:

> Neither the convening authority nor any other officer is authorized to add to the punishment imposed by a court-martial. A sentence adjudged by the court may be approved if it was within the jurisdiction of the court to adjudge and it does not exceed the maximum limits prescribed by the President under Article 56 (Ch. XXV) for the offenses of which the accused legally has been found guilty. When a sentence in excess of the legal limits is divisible, such part as is legal may be approved.[20]
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> * * * * * * *
>
> * * * However, when a court has adjudged a mandatory sentence to imprisonment for life (Art. 118 (1) and (4)) [premeditated or felony murder], the convening authority may approve any sentence included in that adjudged by the court.

Implicit in the statute and the Manual provisions is the concept that the convening authority is not required to order a rehearing (retrial) before the court-martial if he disapproves some of the findings

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[20] A sentence to confinement is recognized as divisible in both military and federal law. Therefore, when it exceeds legal limits it may be void only as to the excess. *United States* v. *Keith*, *supra*, 1 USCMA 442; *Bozza* v. *United States*, 330 U. S. 160, 166–7; *Pierce* v. *United States*, 252 U. S. 239, 252; *Harlan* v. *McGourin*, 218 U. S. 442; *Brewster* v. *Swope*, 180 F. 2d 984 (C. A. 9); *Gibson* v. *United States*, 149 F. 2d 381, 384 (C. A. D. C.); *Spirou* v. *United States*, 24 F. 2d 796 (C. A. 2), certiorari denied, 277 U. S. 596.

upon which the sentence was based. If a court-martial adjudges a sentence which exceeds legal limits for the approved findings, the convening authority may reduce it to a legal and appropriate sentence. If, in a multiple conviction case, he disapproves some of the findings of guilt returned by the court-martial, he is nevertheless entitled to approve the sentence adjudged by the court-martial, provided that it does not exceed the legal limits for the findings approved. If a case is returned to the convening authority for a rehearing after some, but not all, findings of guilty have been held erroneous by the board of review or by the Court of Military Appeals, and the convening authority determines that a rehearing is impracticable, he may dismiss the charges under which erroneous findings were returned and reassess a legal and appropriate sentence for the remaining findings of guilty. See *United States* v. *Field,* 5 USCMA 379, 18 CMR 3.

In the *Field* case, the accused had been convicted at his first trial of forgery and absence without leave. Upon review, the Court of Military Appeals reversed the finding as to forgery, affirmed the finding as to absence without leave, and remanded the case to the Judge Advocate General of the Army. It directed that the case be returned to the board of review to determine an appropriate sentence for absence without leave or that it be returned to the convening authority for rehearing, if practicable, on the forgery charge. In the latter event, the court-martial was to resentence as to both offenses if a finding of guilty was again returned as to forgery. *United States* v.

Field, 3 USCMA 182, 11 CMR 182. The second procedure was followed; the accused was again convicted of forgery; and the court-martial considered both convictions in imposing sentence. Upon review a second time, 5 USCMA 379, 18 CMR 3, the court held that it was proper to direct the court-martial's attention to the affirmed conviction for absence without leave, and proper for the court-martial to consider both convictions at the time of sentencing.

The second *Field* opinion also discusses the matter of resentencing in the following situation: where some, but not all, of multiple convictions are set aside, the case is thereupon remanded to the convening authority to consider the desirability of a rehearing, and the convening authority concludes that a rehearing would be undesirable or impracticable. The court concluded that in this situation the convening authority would be empowered to fix the sentence (subject, of course, to the proviso that the sentence could not be in excess of the legal limits or in excess of the sentence originally imposed by the court-martial). The situation discussed by the court is indistinguishable in principle from the case (of which the instant cases are examples) where the board of review sets aside one of multiple convictions and concludes, for its own part, that there is no basis for a rehearing, since we deem it plain (see *infra*, pp. 44-61) that the power of the board of review to determine the appropriateness of a sentence is no less broad than that of the convening authority. Accordingly, we set forth the views of the Court of Military Appeals,

as expressed in *Field* (5 USCMA at p. 384), *in extenso:*

> However, what if a record of trial be returned to the convening authority after some, but not all, findings of guilty have been held erroneous by an appellate agency—and that authority concludes, as he properly may, that a rehearing is impracticable? If he elects to dismiss the charges under which the erroneous findings were returned, is he required to convene a court-martial for the purpose of reassessing sentence on the remaining untainted findings? We think not—in the absence of action on the part of appellate authorities setting aside, without limitation or qualification, the sentence returned by the court-martial. It is obvious that the convening authority would not have been required to return the case to a court-martial had he himself disapproved the erroneous findings in the first instance and dismissed the pertinent charges. It must be apparent that it has been our premise herein that, if some of the charges *are presented to a court-martial* for a rehearing purpose, then all must go to the same agency—some, of course, for consideration in connection with sentence only. In the suppositious situation, however, none of the charges has in fact been returned to the trial court level. Therefore, the premise is without application—with the result that no rehearing is then required.
>
> Suppose, however, that the convening authority prefers another course and wishes a court-martial, and not himself, to reassess sentence solely on the basis of the findings deemed proper—all other charges having been dis-

missed by him. One possibility here, of course, assumes the form of revision proceedings, in conformity to Article 62, 50 USC § 649—but severe limitations on their use exist. See Manual, supra, paragraphs 80, 86*d*. May he then order a rehearing limited to the reassessment of sentence? Certainly the Federal civilian procedure permits resentencing by the trial court. Military law, on the other hand, does not seem to afford clear precedent for this action, and for this reason we have hesitated heretofore to pass on the propriety of this procedure. We incline to believe, however, that, since—as demonstrated earlier—it is permissible for a court-martial, following rehearing, to resentence on the basis of previous findings of guilt, after acquittal as to all reheard charges, there is no reason to suppose that a similar reassessment would be erroneous in a situation in which the tainted charges were dismissed—instead of having been reheard and the accused acquitted thereunder. It is, of course, unlikely that this practice will be much followed—for obvious and compelling reasons of a practical character—and we express no opinion concerning its desirability. Because we do not regard it as unlawful, however, it has been mentioned in the interest of completeness.

2. The convening authority's power to alter sentences did not begin with the Code, and the present statutory enactment and executive implementation are the natural culmination of a long course of history. With respect to the ultimate sentence to be approved, reviewing and confirming authorities have always had power to remit and mitigate sentences,

and since at least 1806 this power has been specified by statute. Article 89 of the Articles of War of 1806 (2 Stat. 369–370), provided:

> Every officer authorized to order a general court martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by article 65)[21] to carry them into execution, he may suspend until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court martial shall be held, may pardon or miti-

[21] Article 65, Articles of War of 1806 (2 Stat. 367):

> ARTICLE 65. Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts martial, whenever necessary. But no sentence of a court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial in time of peace, extending to the loss of life, or the dismiss[al] of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be.

gate any punishment ordered by such court to be inflicted.

This power has been continued in reviewing authorities (including convening authorities) by specific provisions in each successive military code since that time.[22]

Until 1920, it was permissible for a reviewing authority to return a record to the court-martial for proceedings in revision with a view to reconsidering an acquittal, reconsidering findings of not guilty of some of the offenses charged, or increasing the sentence. He could not, however, force the court to make findings of guilty or to increase the sentence, and he had no power to change the findings or increase the sentence himself.[23]

As to the findings—as distinguished from the sentence—of a court martial, before 1916 the reviewing authority could merely approve or disapprove. Article 47 of the Articles of War, enacted in that year, for the first time empowered the reviewing authority to approve lesser offenses included within the offense found by the court-martial. He was to achieve this by approving only so much of the findings as involved guilt of the lesser offense and only so much of the sentence as was appropriate to that lesser offense.[24]

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[22] Art. 112, Articles of War, 22 June 1874, R. S. 1342; Article of War 50 of 1916 and 1920 Articles of War (39 Stat. 658; 41 Stat. 797); Articles of War 47(f) and 51(a) of 1948 (10 U. S. C. (1946 ed., Supp. IV) 1518, 1523).

[23] See Fratcher, *Appellate Review in American Military Law*, 14 Missouri Law Review 15, 34–35.

[24] AW 47, 39 Stat. 657; and see Fratcher, *op. cit.*, p. 35.

Clearly present in these various statutory enactments was the concept that the convening authority was not limited to correcting errors of law, and that he was not bound to do only that which the court-martial would have done in his place. Rather, he was entitled to exercise his own independent discretion. In 1895, Colonel Winthrop felt free to say:[25]

> While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him. This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer, is, as will presently be more fully indicated, the official—military commander or Commander-in-Chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein.

Article of War 47 (10 U. S. C. (1946 ed., Supp. IV) 1518) was the immediate predecessor of Article 64 of the Code. It continued the existing power of

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[25] Winthrop, *Military Law and Precedents* (2d Ed. 1920 Reprint) p. 447.

convening authorities to approve sentences adjudged by courts-martial. It also provided that:

> * * * The power to approve the sentence of a court-martial shall include—
>
> (1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;
>
> (2) the power to approve or disapprove the whole or any part of the sentence; and
>
> (3) the power to remand a case for rehearing under the provisions of Article 52.

These powers appear to be separate and capable of being exercised separately. The Manual For Courts-Martial, 1949, par. 87b,[26] so construed them, saying (p. 92): "Approval or disapproval of findings or a sentence or any part of the findings or sentence should not be left to implication. For example, in approving 'only so much' of a finding of guilty as involves a lesser included offense, all elements of the offense intended to be approved should be clearly included in the statement of approval." And with respect to sentences (p. 91): "When a sentence in excess of the legal limit is divisible, such part as is legal may be approved." Clearly, then, under the law which preceded present Article 64, convening authorities had wide powers to determine an appropriate sentence, irrespective of whether all or only some of the findings were affirmed. They were en-

[26] Executive Order 10020, 13 FR 7519.

titled to order rehearings, but were not required to do so.

In *Carter* v. *McClaughry*, 183 U. S. 365, the accused was convicted by general court-martial of sixteen offenses involving conspiracy to defraud the United States, causing false claims to be made against the United States, embezzlement, and conduct unbecoming an officer. He was sentenced to dismissal and confinement for five years and fined $5,000. The President, who acted as the reviewing authority in the case, approved only four offenses—one of each general group—but approved the entire sentence. On habeas corpus, the accused contended (p. 380):

> * * * That the entire sentence is illegal and void because the President having disapproved the conviction as to certain offences and having ordered the original sentence to stand, such sentence ceased to be the sentence of the court-martial.

The Court rejected that contention, saying (p. 385):

> That contention, after all, amounts to no more than to say that if the court martial had acquitted on the disapproved findings, it must be assumed that the sentence would have been less severe, and therefore that the President should have sent the case back or mitigated the punishment, and that because he did not, the punishment must be conclusively regarded as increased. This is wholly inadmissible when the powers vested in the ultimate tribunal are considered.
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> * * * * *

> * * * He [the President] might have referred the proceedings back to the court for revision, but he was not required to do so, if in his opinion this was not necessary, and the sentence was justified by the findings which he did approve. As President he might have exercised his constitutional power to pardon, or as the reviewing authority he might have pardoned or mitigated the punishment adjudged except that of dismissal, although he had no power to add to the punishment. He did not think it proper to remand, to mitigate or to pardon. * * * [183 U. S. at 387].[27]

This history, which leaves no doubt that the initial reviewing authority has always had power to alter court-martial sentences in accordance with the advice he receives as to the law and his own impression of the requirements of justice and discipline, effectively disposes of any claim that the sentence ultimately approved must conform precisely to that specifically imposed by the court-martial for the exact finding or findings ultimately approved. It has never been demanded that a court-martial case be sent back to the trial body for adjusting the sentence to the later approved findings.

3. With this background, a subcommittee of the Committee on Armed Services, United States Senate, 81st Congress, conducted hearings on the Code. The Code had been drafted by a committee appointed

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[27] It is impossible to avoid the *Carter* v. *McClaughry* holding by contending that the President merely refused to exercise executive clemency in the case. The action of the President upon a court-martial sentence is judicial in character. *Runkle* v. *United States*, 122 U. S. 543.

by Secretary of Defense Forrestal, headed by Professor Edmund M. Morgan, Jr., of Harvard Law School. In his prepared statement filed with the committee, Professor Morgan spoke of the convening authority, acting in review, and said, "There is an initial review by the convening authority covering law, facts, credibility of witnesses and a *review of the sentence*" (Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 1st Sess., on S. 857 and H. 4080, p. 36, emphasis added).

In its report to the Senate on the Code, the Committee commented on Article 64, stating (Senate Rep. No. 486, 81st Cong., 1st Session, p. 27):

> ARTICLE 64. *Approval by the convening authority*
>
> This article authorizes the convening authority to approve only such findings of guilty, and the *sentence or such part or amount of the sentence, as he finds correct in law and fact and determines should be approved.*
>
> It substantially conforms to present practice in all the armed forces. The convening authority can approve a finding only if he finds that it conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, commentary.) He may approve only so much of a finding as involves a finding of guilty of a lesser included offense. (See art. 59.) *He may disapprove a finding or a sentence for any reason.* [Emphasis added.]

There is nothing in the legislative history of the Code or the Manual provisions to indicate that Congress or the President intended to restrict the long-established power of the convening authority to determine personally an appropriate sentence. As indicated above, the contrary appears. The convening authority is entitled to determine sentence appropriateness without regard to what the court-martial might have done had it considered only the approved findings. The convening authority, in reviewing a case, is entitled to disapprove some of the findings of guilt and yet affirm the entire term of confinement, if such a sentence is legal and he believes it to be appropriate. CM 353349, *United States* v. *Gephart,* 4 CMR 306. Clearly, therefore, he may also reduce the sentence to make it appropriate to the findings he affirms.

B. BOARDS OF REVIEW POSSESS THE SAME POWER AS DOES THE CONVENING AUTHORITY TO WEIGH FACTS AND DETERMINE SENTENCE APPROPRIATENESS, WITHOUT REGARD TO WHAT THE COURT-MARTIAL MIGHT HAVE DONE HAD IT CONSIDERED ONLY THE FINDINGS AS AFFIRMED

1. The present law requiring appellate review of court-martial cases by boards of review grew out of an Army departmental practice which was adopted during World War I through a series of administrative orders. Section 1, General Orders No. 169, War Department, 29 December 1917, directed confirming authorities to defer publication of the confirmation of death sentences and execution of such sentences until the record of trial had been reviewed in the Office of The Judge Advocate General, and the confirming

authority had been advised there was no legal objection to execution of the sentence. This order was superseded, effective 1 February 1918, by Section 1, General Order No. 7, War Department, 17 January 1918, the text of which is reprinted in the Appendix, *infra,* pp. 68–71. This order established a Branch Office of The Judge Advocate General in France, provided for review in that office as well as in the Judge Advocate General's Office, and expanded the types of cases to be reviewed. Boards of review were set up by the Judge Advocate General to accomplish the review required by these General Orders.[28]

The Articles of War of 1920 gave statutory recognition to the boards of review.[29] They provided, *inter alia,* that the reviewing or confirming authority could not, in a contested case, order the execution of any general court-martial sentence involving death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, prior to review of the record of trial by a board of review. If the board of review and the Judge Advocate General agreed that the record of trial was legally sufficient to support the findings and sentence, the reviewing or confirming authority could then order the execution of the sentence. If the board of review and the Judge Advocate General agreed that the record of trial was not legally sufficient to support the findings or sentence, in whole or in part, or that errors of law had been committed injuriously affecting the sub-

[28] For detailed discussion of these orders and partial text of G.O. No. 169, see Fratcher, *supra,* at pp. 40–43.

[29] Article of War 50½, 41 Stat. 797–799.

stantial rights of the accused, the sentence was to be vacated in whole or in part. If the sentence was wholly vacated, the record was to be returned to the reviewing or confirming authority for proceedings in revision or for a decision as to whether he wished to order a rehearing or dismiss the case. If the board of review and the Judge Advocate General did not agree on a case, the record, with the holding of the board and the Judge Advocate General's dissent, was to be forwarded to the Secretary of War for the action of the President. The President could then confirm the action of the reviewing or confirming authority, in whole or in part, with or without remission, mitigation, or commutation, or disapprove any finding of guilty in whole or in part, and disapprove or vacate the sentence in whole or in part. Incident to disapproval, he could order a rehearing.[30]

Apart from certain delegations of the President's confirming authority,[31] appellate review at departmental level remained unchanged until February 1, 1949, at which time the 1948 amendments to the Articles of War became effective.[32] For the first time, boards of review were given the authority "* * * to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."[33] The power of the boards of review to determine the

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[30] Fratcher, *op. cit.*, footnote 23, *supra*, pages 48–50.

[31] See Exec. Order 9363, 23 July 1943, 3 Code Fed. Regs. 34 (Supp. 1943); Exec. Order 9556, 26 May 1945, 3 Code Fed. Regs. 70 (Supp. 1945).

[32] 10 U. S. C. (1946 ed., Supp. IV) 1471–1593.

[33] Article of War 50 (g), 10 U. S. C. (1946 ed., Supp. IV) 1521.

legality of sentences was continued,[34] but they had no power to determine sentence appropriateness. The latter power was vested, however, in the Judge Advocate General and the newly created Judicial Council.[35] The significance of Article of War 50 here is that it added both of the extraordinary powers—to weigh facts and determine sentence appropriateness—previously confined to the first stage of review (review by the convening authority), to the second stage of review as well.

Petitioner Jackson (Br. 619, p. 22) is in error in his contention that, under the predecessor statute to Article 66, boards of review were required to return cases for a rehearing if they disapproved a part of the findings. Article of War 50 (d) read in part, as follows:[36]

> (3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President

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[34] Article of War 50 (e).

[35] Article of War 51 (a), 10 U. S. C. (1946 ed., Supp. IV) 1523: "The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, * * *"; Article of War 49, 10 U. S. C. (1946 ed., Supp. IV) 1520.

[36] Counsel for petitioner Jackson asserts that this case would have been governed, under the old law, by the procedures set out in Article of War 50 (e) (3), but this is in error. A sentence to life imprisonment was adjudged and approved here. Under Article of War 48, 10 U. S. C. (1946 ed., Supp. IV) 1519, it was, therefore, a case where confirming action by the Judicial Council, with the concurrence of the Judge Advocate General, was required. Accordingly, review by the board of review would have been governed by Article of War 50 (d) (3) and (4).

or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under Article 48a.

If the board of review held a record of trial legally sufficient to support attempted rape, but legally insufficient to support premeditated murder and legally insufficient to support the sentence, under former law it would submit this holding to the Judge Advocate General. If he concurred, he could reduce the sentence to a legal and appropriate sentence under Ar-

ticle of War 51,[37] or return the case to the convening authority for a rehearing or such other action as might be proper. The convening authority could either order a rehearing or reduce the sentence to one which was legal and appropriate for the offense affirmed.[38] If the Judge Advocate General did not agree with the board of review, he would forward the case to the Judicial Council, a group of three general officers constituted in his office. If the Judicial Council agreed with the Board's holding of legal insufficiency and the Judge Advocate General then concurred, both had the power to reduce the sentence.[39] If the Judge Advocate General still disagreed, a case involving life imprisonment would be forwarded to the Secretary of the Army for final determination.[40] This official also had the power to reduce the sentence without reference to the court-martial.[41] Thus, under prior law, petitioners would not have been entitled to a rehearing before the court-martial on the sentence, but merely to adjustment by a different authority.

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[37] 10 U. S. C. (1946 ed., Supp. IV) 1523.

[38] The 1949 Manual said (par. 89, p. 100): "A rehearing may not be ordered by an authority empowered to take that action if, upon taking his final action, he approved a part of the sentence." By implication, the convening authority could elect to approve such part of the sentence as represented a legal and appropriate sentence for the approved finding, rather than disapprove all of the sentence and order a rehearing. Such a procedure would be consistent with the statutory enactment and its predecessors.

[39] See Article of War 49, 10 U. S. C. (1946 ed., Supp. IV) 1520, "Powers incident to power to confirm."

[40] Article of War 48b, 10 U. S. C. (1946 ed., Supp. IV) 1519.

[41] See Article of War 49, *supra*, footnote 39.

2. As noted above (p. 43), the Code was drafted by a committee headed by Professor Edmund M. Morgan, Jr. In his testimony before the Senate Sub-Committee, Professor Morgan stated, in speaking of boards of review:

> * * * the board of review, now, has very extensive powers. It may review law, facts, and practically, sentences; because the provisions stipulate that the board of review shall affirm only so much of the sentence as it finds to be justified by the whole record. It gives the board of review * * * the power to review facts, law and sentence, and to judge the credibility of witnesses and to make new findings * * * insofar as they may be in favor of the accused * * *. [Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 1st Sess., on S. 857 and H. R. 4080, p. 42.]

The Judge Advocates General of the Army and Navy appeared before the congressional committees and indicated opposition to lodging in the board of review the proposed authority to alter sentences. Having in mind the position taken by those officials, the Congress nevertheless decided to give boards of review the power to determine sentence appropriateness, as proposed by the drafting committee. This is shown by the following exchange at page 311 of the cited hearing:

> Senator KEFAUVER. The next controversial subject is the board of review * * *.
>
> Professor MORGAN. Yes.
>
> Senator KEFAUVER. The board of review.

Professor MORGAN. The first thing I understand on that, Senator, is that they [the services] do not want the board of review to handle sentences, is that right?

Mr. GALUSHA. That is right.

Senator KEFAUVER. That is right.

* * * * *

Senator SALTONSTALL. Mr. Chairman, I do not want to make hasty decisions, but if you feel the same way, I would say very clearly that I believe they should have the right to reduce sentences.

Senator KEFAUVER. I think undoubtedly it should be there. We will check that as satisfactory, and we will pass on to the next item. * * *

In its report on the bill to the full Senate, the Committee had this to say with respect to Article 66:

> The Board of Review shall affirm a finding of guilty of an offense or a lesser included offense * * * if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. * * * The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces. [Senate Rep. No. 486, 81st Cong., 1st Sess., page 28.].

The code provisions giving boards of review authority over sentences had a similar history in the

House of Representatives. See House Report No. 491, 81st Congress, 1st Session, page 31. The attitude of the House Committee on Armed Services was exemplified by the statement of Congressman Rivers during discussion of the bill in the House of Representatives:

> Mr. RIVERS. * * * Members of the armed services charged with commission of crimes are guaranteed more rights than any civilian enjoys today in our Nation. Notable among these are as follows:
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> * * * * *
>
> Third. The Board of Review reviews the facts as well as the law with full authority to remit the sentence or any part thereof and to reverse the case.
>
> * * * * *
>
> The above are notable advances, and guaranties in future days that are to come. * * * [95 Cong. Rec. 5729, May 5, 1949.]

Thereafter, Congress enacted Article 66 of the Code, 50 U. S. C. 653, codified and reenacted as 10 U. S. C. 866. Article 66 (c) provided in pertinent part:

> (c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and

> determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[42]

3. The United States Court of Military Appeals, which was created by Article 67 of the Code as a court of last resort in the military appellate system, has often had occasion to interpret the sentence power given to boards of review by Congress. As early as *United States* v. *Keith*, 1 USCMA 442, 4 CMR 34, the problem was before that court. Keith had been convicted of misbehavior before the enemy and desertion, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The findings and sentence were approved by the convening authority and affirmed by a board of review. The Court of Military Appeals reversed the conviction of misbehavior and affirmed that of desertion. But that was not the end of its problem, for the question of appropriate sentence remained. The court stated its holding in these words (1 USCMA at 451):

> For reasons mentioned earlier herein the decision of the board of review as to the offense of misbehavior before the enemy is reversed. However, the decision as to the offense of desertion is affirmed. Were the setting of the present case a civilian one, we would experience no difficulty in remanding to the court trying the accused for reconsideration of sen-

[42] Because of its authority to weigh facts, the board of review applies a test of reasonable doubt, rather than substantial evidence, in determining evidential sufficiency. See the Statement, *supra*, p. 9.

tence or for retrial. In a military situation, however—and for reasons which must be apparent to all—this disposition of the matter is impracticable, if not impossible of achievement. In view of the lapse of time involved, it is highly probable that the court-martial which tried the accused, Keith, is no longer functioning as such. Through change of assignment, or otherwise, its members, indeed, may be scattered beyond recall. Even assuming the contrary in the present situation, the mentioned impossibility is certain to exist in many others involving an identical problem. Remand to the trial forum, for virtually any purpose in the military scene, is a difficult business, and remand from this Court simply an unworkable device. Fortunately, it is also an unnecessary one. The Uniform Code of Military Justice, Article 66 (c), 50 U. S. C. § 653, provides as follows:

"In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilt, *and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.* In considering the record, it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." [Emphasis added.]

Had the board of review, following its appearance before that body, disapproved the

findings of guilty as to the misbehavior charge in the present case, it could have affirmed only "such part or amount of the sentence, as it * * * [found] correct in * * * fact and * * * [determined], on the basis of the entire record, should be approved." This Court is without statutory authority to act in such a manner. We may, however, correct a board of review in matters of law—and this we have done in the instant case with respect to board action on the charge specifying an instance of misbehavior. Accordingly, we now remand the case to The Judge Advocate General, United States Army, for reference to the board of review for the purpose of determining the adequacy of the sentence. See Uniform Code of Military Justice, Article 67 (*f*), 50 U. S. C. § 674, [sic] in doing this we are not to be understood as expressing any view concerning the appropriateness to the offense of desertion of the sentence adjudged by the court-martial which tried petitioner. We merely suggest that, in the absence of a sentence exceeding maximum legal limits, we are, by the statute creating this Court, without authority to determine the question.

In *United States* v. *Bigger*, 2 USCMA 297, 8 CMR 97, the board of review had reduced a conviction from premeditated to unpremeditated murder and also reduced the sentence from death to life imprisonment. After quoting Article 66 (c), Uniform Code of Military Justice, the Court of Military Appeals said (2 USCMA at pp. 304–305):

Clearly the board of review was acting within the authority of Article 59 (b)[43] when it approved a finding of guilty of unpremeditated murder, a lesser included offense of that found by the court-martial. If it had that power then by Article 66 (c), it could approve only such sentence or part thereof as was correct in law. The reduced finding rendered the sentence as originally imposed illegal so unless the board had the power to change the sentence to confinement it had no alternative other than to grant a new trial. Going one step further, if it must grant a new trial then Congress intended to restrict Article 59 (b) in a manner neither expressed nor implied.

* * * * * *

* * * If we consider, compare, and fit the quoted provisions into a pattern, we must conclude that Congress intended to authorize boards of review to affirm findings of guilty of lesser included offenses and that if by so finding the sentence imposed becomes illegal, to permit the board to substitute a lesser legal sentence. Conceding this permits boards of review to commute in the field of murder, it is what we believe Congress intended to accomplish when it authorized boards of review

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[43] Article 59 (b) provides:

Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm so much of the finding as includes a lesser included offense.

Both "approval" and "affirmance" appear to be words of art in military law. In both the Code and the Manual, "approval" is ordinarily used with reference to the convening authority's action; "affirmance" with reference to the action of the board of review and the Court of Military Appeals.

to evaluate facts, reduce findings, and adjust sentences to fit the offenses affirmed.

In *United States* v. *Stenk*, 7 USCMA 277, 22 CMR 67, the accused was found guilty of three offenses and sentenced to dismissal by the court-martial. The board of review reversed as to one offense, affirmed the other two findings, and affirmed the sentence, having found it to be appropriate. The Court of Military Appeals affirmed, stating (p. 279):

> A right to fit the punishment to the crime is thus vested in that agency [the board of review], but no such power has been conferred on us. Here the board concluded that the sentence as imposed by the court-martial was legal and appropriate in all respects for the offenses which were affirmed.

The opinion then sums up the court's interpretation of Article 66 (c), as follows (p. 281):

> Over the five-year period of this Court's existence, we have repeatedly returned cases to boards of review for reassessment of sentence when a specification has been dismissed or the findings set aside by us. In addition, those agencies have long determined the appropriateness of sentences in the light of altered and modified findings. The power of a board to fix the quantum of punishment with or without affirming all findings is no longer in doubt. The principles controlling in that area have become so well fixed that little need be said concerning their place in our practice and procedure. However, at the risk of being redundant, we repeat that in military law, a single inclusive sentence is imposed, and un-

less a board of review has the power to affirm a sentence in whole or in part when findings are modified, the whole appellate superstructure must be redesigned. One of the cardinal principles set out in Article 66 of the Code is that a board of review may affirm all or part of the findings and determine a specially suited sentenee from the entire record. That obviously means the record as it stands or as it has been changed by action on the findings. That must necessarily follow, for in some instances, the punishment imposed by the court-martial is assessed solely on the most serious aspect of the criminal transaction even though it may have been charged in several ways. In other situations, the total sentence may be determined by totaling the punishment considered appropriate for each crime. The record does not disclose the method used, but to make a workable system, some appellate agencies must have the power to adjust the sentence if the findings are changed on appeal. Congress has given boards of review the authority to determine the appropriateness of sentence, and surely within that grant of power would be the right to make the determination regardless of the action on the findings, in all cases where the sentence is one which the board is authorized to change.

4. In sum, in the light of established military practice, it is reasonable to conclude that when Congress gave boards of review the power to determine sentence appropriateness, as well as legality, it empowered the boards to act *without regard to what the court-martial might have done in imposing a sentence,*

had it been faced with only the affirmed findings of guilt. Congress intended boards of review to exercise both of the major review powers once reserved to the convening authority alone: the power to weigh facts and the power to determine not only sentence legality, but also sentence appropriateness.

The power over the sentence must exist if the first power to review the facts is to be exercised effectively. There would be small advantage to the accused in the board's right and duty to weigh facts if it could not also adjust the sentence to render it appropriate to the findings of guilt affirmed. And, certainly, the whole military appellate system would be unworkable if a case had to be returned to the court-martial for resentencing because a reviewing authority reduced or reversed some of the findings." In this case, for example, the accused were tried in Korea. Through transfer to other assignments, the court-martial members no doubt have been scattered over the face of the earth. Doubtless, some are no longer in the service. It is unlikely that the court-martial could be reassembled at all, and certain that it could not be done

" From the time that the new Code became effective on May 31, 1951, until December 31, 1955, the boards of review in all of the military services modified the findings in 2,861 cases, and the Court of Military Appeals modified the actions of boards of review in an additional 357 cases. Annual Report of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces and General Counsel of the Department of the Treasury, for the period 1 January 1955 to 31 December 1955. These figures do not, of course, include the innumerable cases (as to which no accurate data are available) in which findings have been modified by convening authorities.

except with great difficulty. Yet, if the return of a case for resentencing is considered to be a revision proceeding under Article 62 of the Code—a procedure limited to the correction of errors or omissions which can be rectified without prejudice to the accused—the proceeding "may be taken *only* by the members of the court who participated in the findings and sentence." Manual, par. 80b, p. 130. (Emphasis added.) In most cases, then, the accused would go unsentenced, for the members could not be reassembled.

If the return of a case to a court-martial for resentencing is regarded, on the other hand, as a limited rehearing under Article 66 (d), it must be considered that "[e]very rehearing shall take place before a court-martial composed of members who were *not* members of the court-martial which first heard the case". Manual for Courts-Martial, 1951, par. 92, p. 160. In net effect, this means that rehearings for the purpose of resentencing would be conducted before officers who were unfamiliar with the case and who would determine the sentence on the basis of the cold record. The very same thing can be done by the board of review more expeditiously, more intelligently, and more fairly. Furthermore, only the board of review is in a position to have in mind the sentences imposed in similar cases when determining sentence appropriateness, a major consideration in the eyes of Congress (*supra*, p. 51).

Congress must have known of the limitations, both legal and practical, upon rehearing and revision proceedings, for they are a carry-over from prior law. It must have intended, we submit, that reviewing

authorities might exercise the powers of sentence adjustment conferred upon them free from the completely hampering consequences which would flow from the notion that they are bound to ascertain what is in fact unknowable in a system characterized by the sentence in gross—what the court-martial might have done had it apportioned its sentence.

Petitioner Jackson urges that, if the board of review has the power to determine an appropriate sentence for the findings which it affirms, an injustice will result. As noted *supra*, pp. 50–52, review of sentences by boards of review was considered (and it has proved to be) an ameliorative provision. Essentially, his complaint is that, although his murder conviction was set aside, the sentence, in his particular case, was adjusted to the maximum for attempted rape. That does not establish injustice; nor does it detract from the conclusion that it was for Congress alone to decide whether the power to adjust military sentences might reasonably be conferred upon reviewing authorities.[48]

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[48] Jackson also contends (Br. No. 619, p. 27) that ambiguous statutes must be resolved in favor of accused persons; that Article 66 is ambiguous; and that this ambiguity is conclusively shown by the division of the courts of appeals on the petitions for habeas corpus filed in the instant cases and in *De Coster*. This reasoning is faulty. The opinion in *De Coster* v. *Madigan*, 223 F. 2d 906 (C. A. 7), is premised, at least in part, on the proposition that the court-martial did not give any consideration to the offense of attempted rape at the time of sentencing and that no part of the sentence adjudged was imposed for that offense (see *supra*, p. 27). No consideration was given there to the question of whether, had the sentence been imposed in contemplation of both offenses, the board of review would have had the power to reduce it.

III

THE ADJUSTMENT OF SENTENCE BY THE BOARD OF REVIEW WAS APPROPRIATE

Petitioners suggest that the sentence affirmed by the board of review, even if legal, was unreasonably harsh, and that, therefore, they are entitled to resentencing at the hands of a court-martial. This position is without merit.

In the first place, we note that the facts set forth by the board of review in its opinion (CM 347258, *United States* v. *Fowler,* 2 CMR 336) reveal that this attempted rape was distinguished principally by its brutality and that reasonable men could well conclude that the maximum sentence was appropriate. The accused admitted, in their voluntary pretrial statements (2 CMR at 342):

> * * * that on the night in question the three accused set out from camp in search of sexual intercourse; that they went to a nearby village and entered a Korean house; that, while Fowler stood guard, DeCoster and Jackson seized their victim, removed the clothing from the lower part of her body and carried her to a ditch where DeCoster unsuccessfully attempted to overcome her resistance and have intercourse with her; that Jackson and DeCoster then carried her to a house where DeCoster again tried without success to have intercourse while his companions stood guard; and that some Koreans in an attempt to rescue the woman fired shots which caused the accused to return their fire and flee.

The following morning, the victim was found dead as the result of a gunshot wound. The body was semi-nude, the right wrist was bruised, and "the vaginal vault was 'gaping' and contained spermatozoa; * * *" (2 CMR at 338). It is apparent that the court-martial did not go beyond the express admissions in the pretrial statements in finding attempted rape, rather than rape (the offense charged). In addition, the board of review gave the accused the benefit of its doubt as to whether or not they had inflicted the death wound. But the facts which remained for consideration demonstrated that this was an aggravated and brutal case.

Furthermore, if the sentence is legal, the question of its severity is not one which may be considered on habeas corpus. *Carter* v. *McClaughry*, 183 U. S. 365, 401 ("the sentences of courts martial * * * cannot be revised by the civil courts save only when void because of an absolute want of power * * *"); *Sanford* v. *Callan*, 148 F. 2d 376, 377 (C. A. 5); *Allen* v. *Wilkinson*, 129 F. Supp. 73, 74–75 (D. C. Pa.); *Ex parte Campo*, 71 F. Supp. 543 (S. D. N. Y.); *Flackman* v. *Hunter*, 75 F. Supp. 871 (D. Kan.). The maximum punishment which may be imposed for offenses is a matter of policy which in military law has been left to the President.[46] The sentence here does not exceed the maximum permissible for the

[46] Article 56, UCMJ, 10 U. S. C. 856: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

offense [47] and has been determined to be appropriate by an agency charged with making that determination. Therefore, there is no basis for judicial review of that action.

There is no concept in military law that a sentence may be legal and yet reversible as arbitrarily and unnecessarily harsh. Petitioners' contention that *United States* v. *Voorhees,* 4 USCMA 509, 16 CMR 83, stands for this proposition is not correct. In *Voorhees,* the accused was convicted of willful disobedience (5 years maximum penalty; Table of Maximum Punishments, MCM, 1951, par. 127*c,* p. 220); two violations of a general regulation (2 years maximum penalty for each; Table of Max. Punishments, *supra,* p. 221); and two minor disorders, the maximum penalty for each being 4 months. The court-martial sentenced the accused to dismissal from the service, which is an authorized punishment for any violation of the Uniform Code by an officer. MCM, 1951, par. 126*d,* p. 208. The board of review disapproved the convictions as to the three major offenses and one of the minor ones, and affirmed the sentence, which was a legal punishment for the finding affirmed. The United States Court of Military Appeals reversed, saying that in this instance the case had to be submitted to a court-martial for resentencing. But here a peculiar feature of military law came into play. Although a board of review possesses the power to reduce or mitigate a

[47] Table of Maximum Punishments, MCM, 1951, par. 127*c,* p. 225.

sentence, Article 66 (c), UCMJ, *supra,* it has no power to *commute* a sentence (*i. e.,* change the nature of the penalty) if the sentence is a legal punishment for the offense. Article 71 (b), UCMJ; MCM, 1951, par. 105*a,* p. 174; *United States* v. *Goodwin,* 5 USCMA 647, 18 CMR 271; *United States* v. *Freemen,* 4 USCMA 76, 15 CMR 76; cf. *United States* v. *Bigger,* 2 USCMA 297, 8 CMR 97, where the death sentence was *illegal* for the offense affirmed by the board of review. A sentence to dismissal is a sentence which cannot be mitigated or reduced in quantity or quality; it can only be commuted. *United States* v. *Goodwin, supra,* at pp. 658–659; *United States* v. *Voorhees, supra,* at p. 542. Therefore, in the *Voorhees* case, the board of review had no free choice in the sentence which it could affirm. It had affirmed one conviction for which a sentence to dismissal was legal, even though it disapproved numerous other offenses. It could not commute that sentence. Accordingly, it could only (a) disapprove the sentence in its entirety and permit the accused to go unpunished; (b) affirm a sentence which had been imposed for many serious offenses but which was now supported by only one minor one; or (c) order a rehearing before a court-martial for sentencing only. The Court of Military Appeals therefore held that where the board of review lacks authority to compensate for the convictions it reverses by a reduction in the sentence, the board must order a rehearing before a court-martial. This rule, if it can be said to amount to one, applies *only* when there are no substantial offenses remaining to support the sentence.

United States v. *Stene, supra,* 7 USCMA 227, 22 CMR 67.

The *Voorhees* decision obviously has no application to the cases before this Court. Here, the accused were sentenced to life imprisonment, a punishment which could be mitigated. After disapproving the conviction for premeditated murder, the board of review reduced the sentence to twenty years confinement, a sentence which is less than but similar to life imprisonment, both in quality and quantity. No question of commutation was presented. The board acted only after expressly determining that the approved sentence was an appropriate penalty. CM 347258, *United States* v. *Fowler,* 2 CMR 336 at 345, 346. The Court of Military Appeals has never held that a board of review must reduce a confinement sentence to less than the maximum authorized for the conviction or convictions affirmed, where it disapproves some of the convictions upon which the original sentence was based. It is only necessary, the court concluded in *Voorhees,* that the board have the power to modify the penalty (which it did *not* have in *Voorhees*), and that it expressly conclude that the sentence which it affirms is appropriate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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APRIL 1957.

APPENDIX

GENERAL ORDERS } WAR DEPARTMENT,
No. 7 } Washington, January 17, 1918.

I—Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the 51st Article of War.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as

provided in the 52d Article of War, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which

date, in any given case, will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

[250.4, A. G. O.]

II—There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so de-

tailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

[250.4, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

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